(2) Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. JAFFE, M.D.,

Petitioner,

vs.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition For Writ of Certiorari
To the California Court of Appeal
Second Appellate District

PETITION FOR WRIT OF CERTIORARI APPENDIX

ROBERT J. JAFFE, M.D.
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Woodland Hills, CA 91367
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Petitioner in Pro Se

Filed 12/1/04 Jaffe v. Kaiser Foundation Hosp. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, Rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or order published, except as specified by Rule 977(b). This opinion has not been certified for publication or ordered published for purposes of Rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FIVE

ROBERT J. JAFFE,
Plaintiff and Appellant

B166698

(Los Angeles County
Super. Ct. No.BS069856)

v.

KAISER FOUNDATION
HOSPITAL et al.,
Defendants and Respondents.

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Robert J. Jaffe, in propria persona, for Plaintiff and Appellant
Foley & Lardner, Lowell C. Brown, Sarah G. Benator, and Lauren Reisman, for Defendants and Respondents.

I. INTRODUCTION

Robert Jaffe, M.D., plaintiff, appeals from a judgment denying his administrative mandate petition to compel the reinstatement of his medical staff membership and clinical privileges at Kaiser Foundation Hospital—Panorama City. Plaintiff also appeals from an order denying his motion to vacate that judgment. Plaintiff named as defendants: Kaiser Foundation Hospital—Panorama City; Southern California Permanente Medical Group; and Kaiser Health Plan, Inc. The administrative action at issue was taken by Kaiser Foundation Hospital—Panorama City. For purposes of clarity, we will refer to the hospital as defendant. However, our legal conclusions apply equally to the remaining defendants. We affirm both the judgment and the order denying plaintiff's motion to vacate.

II. BACKGROUND

A. Medical Staff Bylaws

Defendant's medical staff bylaws encompass the investigation and adjudication of allegations of improper conduct by medical staff. The first step is investigatory. Defendant's Executive Committee or its designee: conducts an investigation; notifies the subject of the investigation; prepares a written report; and recommends action. The recommended action may include suspension of clinical privileges and revocation of staff membership. In addition, the Executive Committee has discretion to implement summary suspension at any time. When a recommendation to revoke membership and suspend privileges is made, the staff member is entitled to written notice of the adverse recommendation and of the right to request a hearing before the Executive Committee. Defendant's bylaws provide in that regard: "Procedural Rights. Any recommendation by the Executive Committee . . . which constitutes grounds for a

hearing . . . shall entitle the staff member to the procedural rights provided in [the hearing and appeals procedure section]. In such cases, the Hospital Administrator shall give the member written notice of the adverse recommendation and the right to request a hearing [before an arbitrator] in the manner specified in [the hearing and appeals procedure section]."

In addition, the bylaws provide for an informal attempt to resolve the issues. They state: "To facilitate the resolution of interprofessional issues at an early stage, a member who is entitled to the procedural rights provided in [the hearing and appeals procedure section] may request an informal hearing before the Executive Committee. The request shall be in writing and shall state the specific reasons and the evidence which supports the request. The Executive Committee shall fix the time and place for the hearing as soon as the committee reasonably may be convened, but, preferably, on a date within ten (10) working days after receipt of the request. The member shall be entitled to be accompanied by and represented at this closed, informal hearing only by a physician, dentist or podiatrist licensed to practice in the State of California who is not an attorney at law and who is, preferably, a member in good standing of the Professional Staff."

B. Peer Review Proceedings

On April 18, 1994, defendant's Medical Staff Credentials and Privileges Committee recommended that the Executive Committee investigate plaintiff's practice. An investigation ensued. On August 1, 1994, the Executive Committee recommended termination of plaintiff's medical staff membership and clinical privileges. The Executive Committee also summarily suspended plaintiff's privileges pending his appeal. On August 2, 1994, plaintiff was given notice of the Executive Committee's recommended action,

his summary suspension, and his rights to both a formal and an informal hearing. Defendant submitted a Business and Professions Code[1] section 805 report to the Medical Board of California regarding the suspension of plaintiff's staff privileges pending any appeal of the termination recommendation. Summary suspension of medical privileges is authorized by section 809.5.[2] Plaintiff requested both an informal and a formal hearing. The informal hearing was held on August 15, 1994. Following the informal hearing, the Executive Committee voted to uphold its recommendation.

The formal hearing, conducted before an arbitrator, commenced on April 24, 1995, and continued to September 18, 1997. The arbitrator's ruling, issued on December 15, 1997, upheld defendant's decision to revoke plaintiff's staff membership and clinical privileges. The arbitrator found that between 1986 and 1994: plaintiff's treatment of 12 patients had been below the community standard of care; plaintiff had prescribed excessive medication in 2 of those cases; in 1 of the 2 excessive medication cases, plaintiff administered excessive steroid injections; medical record entries were inadequate, deficient, or problematic in 6 cases; and plaintiff had, on at least 1 occasion, used a single syringe to inject multiple patients, a practice not only below the community standard of care, but "intolerable" and exhibiting "an astonishing lack of judgment." The arbitrator stated his findings were based on the individual cases presented. The findings also noted an ongoing pattern of indifference or

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[1] All further statutory references are to the Business and Professions Code except where otherwise noted.

[2] Section 809.5, subdivision (a) states in pertinent part, "[A] peer review body may immediately suspend . . . clinical privileges . . . where the failure to take that action may result in an imminent danger to the health of any individual . . . ."

defiance by plaintiff concerning defendant's policies, procedures, and directives.

Plaintiff appealed the arbitrator's decision to defendant's Appellate Review Panel. In June 1998, the three-member Appellate Review Panel unanimously upheld the arbitrator's decision. The Appellate Review Panel concluded a preponderance of the evidence in the record supported findings: plaintiff had "repeatedly failed to adhere to the policies and procedures and standards of quality care and service" established by defendant. The appellate panel further found: "[Plaintiff's] pattern of failures included: failure to adhere to universal precautions, *e.g.*, re-use of syringes; failure to ensure patient's health and safety by placing patients in potential jeopardy or at risk by prescribing inappropriate medications, including improper volume of medication orders, *e.g.*, benzodiazepine (case NJ); Tylenol with codeine (case JM), multiple steroid injections (case BF), and suboptimal choice of antibiotics in a seriously compromised patient (case CW); failure to assure continuity of care by failing to order and/or record appropriate laboratory tests (case SS); indecipherable and inadequate medical record charting and documentation; and inadequate evaluation and management of cases, contrary to Hospital's guidelines and protocols." Following the Appellate Review Panel's decision, defendant's board of directors terminated plaintiff's staff membership and privileges.

Plaintiff filed his writ of administrative mandate petition on June 7, 2001. The trial court denied the petition. The trial court also denied plaintiff's motions for a new trial or to vacate the judgment. This appeal followed.

III. DISCUSSION

A. Standard of Review

Code of Civil Procedure section 1094.5 (section 1094.5) allows for review by mandate of the hospital's administrative decision. (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 814-817; see *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722.) Section 1094.5, subdivision (a) describes the administrative writ proceeding thusly, "Where the writ is issued for purposes of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury." Section 1094.5, subdivision (b) provides in pertinent part: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. . . ." Section 1094.5, subdivision (d) states, "[I]n cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, . . . or governing bodies of municipal hospitals . . . , abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136; *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 444.)

As the Court of Appeal succinctly stated in *Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at page 444: "When reviewing a final administrative order, the trial court considers the record of the proceedings before the

administrative board. (Code Civ. Proc., § 1094.5, subd. (a).)" The standard of review for the trial court is as follows: "'[T]he reviewing court must uphold the hospital judicial review committee's decision unless administrative findings viewed in light of the entire record are so lacking in evidentiary support as to render them unreasonable.' (*Gaenslen v. Board of Directors* [(1985)] 185 Cal.App.3d [563,] 572.) 'Under the substantial evidence test, it is not the function of reviewing courts to resolve differences of medical judgment.' (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 154 [].)" (*Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at p. 447.) Our standard of review is the same. We independently review the administrative record to determine whether defendant's findings are supported by substantial evidence in light of the record as a whole. (*Hongsathavij v. Queen of Angeles etc. Medical Center, supra,* 62 Cal.App.4th at pp. 1136-1137; *Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at p. 444.) Our colleagues in Division Two of this appellate district have explained "[A]n appellate court must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable. (*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.4th 233, 243 []; *Gaenslen v. Board of Directors, supra,* 185 Cal.App.3d at p. 572.)" (*Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at p. 1137.) In addition, where the facts are undisputed, we independently evaluate fair hearing claims. (*Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 542; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442-1444.)

B. Plaintiff's Briefs on Appeal

Plaintiff raises numerous arguments by way of reference to his opening brief filed in the trial court. Rather than brief those arguments, he incorporates them from papers

filed below. In addition, these and other arguments are not supported by meaningful or, at times any, citations to the record or to pertinent legal authority. These issues have been forfeited. (*Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1313, fn. 6; *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721.) With respect to plaintiff's appeal from the order denying his motion to vacate the judgment, he has not raised any cognizable issue. Therefore, any issue that could have been raised has been waived and the order denying the motion to vacate will be affirmed. (*Building etc. Assn. v. Richardson* (1936) 6 Cal.2d 90, 102; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (2002) 95 Cal.App.4th 709, 713, fn. 2.)

C. The Informal Hearing

Plaintiff devotes a significant portion of his brief to arguing multiple "section 809 violations" occurred during the informal hearing held at his request and pursuant to defendant's bylaws. Plaintiff made no request to continue the informal hearing by reason of any violations of section 809. Plaintiff has not shown that he raised this issue at the time of the informal hearing. If he failed to timely raise the issue in the administrative proceedings, the objection is waived. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 53; *People ex rel. Dept. of Transportation v. Cole* (1992) 7 Cal.App.4th 1281, 1286; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1018-1022.)

Even if the argument is not waived, we conclude section 809 et seq. was inapplicable. Section 809 et seq. governs a physician's right to a hearing after a hospital proposes to take adverse action against a medical staff member. (§ 809; *Sahlolbei v. Providence Healthcare, Inc.*

(2003) 112 Cal.App.4th 1137, 1147-1148.) The trial court found the informal hearing was not subject to the procedural requirements of section 809 et seq. We agree. Plaintiff's right to a hearing that employed the procedural due process protections codified in section 809 et seq. did not arise until *after* the informal investigation activity and the informal hearing were concluded. (§ 809, subd. (a); see *Sahlolbei v. Providence Healthcare, Inc., supra,* 112 Cal.App.4th at pp. 1148-1151.)

D. Peer Review Activities

Plaintiff argues certain evidence was withheld from defendant's Executive Committee. However, the issue before us is the validity of the final administrative decision of the Appellate Review Panel, which upheld the arbitrator's decision following the formal hearing. That determination is the "final administrative order or decision" referred to in section 1094.5. (§ 1094.5, subd. (a); *Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at pp. 1135-1136.)

E. The Arbitration Hearing

1. The outside reviewer

Plaintiff argues a fair procedure violation occurred in that defendant withheld evidence it tampered with an "outside reviewer," Dr. Ronald K. Nudelman. Executive Committee chairperson Dr. Joanne Schottinger asked Dr. Nudelman to review specific patient charts and to give his opinion as to the quality of care at issue in light of community standards. Plaintiff relies on Dr. Schottinger's testimony at the arbitration hearing: "[Plaintiff's counsel]: Q[.] Now, doctor, when you—did you write a letter to Dr. Nudelman? Because he wrote you. His exhibit, which is exhibit 89, is addressed to you, and it appears that, from the

letter, and particularly the last page, which refers to three questions on your part, that you wrote him some sort of a letter. Did you write him a letter? [¶] A[.] There was a cover letter sent with the charts, telling him that the charts were coming, and we asked him to address the issue of community standards outside of Kaiser standards on several questions. [¶] [Plaintiff's counsel]: That letter was not furnished in discovery, and I would like to look at that letter. [Plaintiff's counsel then asked defense counsel,] Do you happen to have it here today[?] [¶] [Defense counsel]: No. [¶] [Plaintiff's counsel]: Assuming we come back tomorrow, will you bring it tomorrow? [¶] [Defense counsel]: I've never seen it. [¶] [Plaintiff's counsel]: I'd like to see it." At that point, plaintiff's counsel turned to a different subject.

Plaintiff subsequently placed the letter in question in evidence. That letter, which is addressed to Dr. Nudelman from Dr. Schottinger states as follows: "Thank you for agreeing to review the selected medical records . . . . As you know, the Executive Committee of the Professional Staff of Kaiser Foundation Hospitals, Panorama City, has requested your services to conduct an independent review of the quality of care provided by the subject physician, Robert Jaffe, MD, for each of the specific cases reflected in the medical records in relation to community standards of care. In this regard, we would also appreciate specific comment on the following issues: [¶] [Medical Record Number 2835614:] Management of diabetic complications including ulcer and proteinuria. [¶] [Medical Record Number 3197473:] Management of a patient with a prosthetic heart valve on coumadin undergoing invasive procedures. [¶] [Medical Record Number 7115574:] Initial management of CHF in the ER and management of positive blood culture upon notification by laboratory. [¶] [Medical Record Number 6817084:] Management of resistant bacteria in pneumonia. [¶] [Medical Record Number 6759778:] Frequency of

multiple steroid injections. [¶] [Medical Record Number 7174143:] Management of anemia, hematuria and falling in a patient on coumadin. [¶] [Medical Record Number 6030542:] Management of coumadin therapy after one episode of atrial fibrillation." The letter continues: "In addition, we would like your opinion on the community standard regarding: [¶] 1. Reuse of syringes after injection for subsequent injections upon change of needles. [¶] 2. Appropriate intervals for monitoring patients on coumadin with PT tests. [¶] 3. Appropriate maximum dosages of halcion."

Plaintiff later declined to cross-examine Dr. Nudelman. At the May 15, 1996, hearing the following occurred: "The arbitrator: . . . And the record should also reflect that I was informed . . . that Dr. Jaffe was waiving his right to cross-examine Dr. Nudelman. [¶] Is that correct?" Plaintiff's counsel responded, "Right." In closing argument before the arbitrator, plaintiff argued Dr. Schottinger's letter to Dr. Nudelman: was provided to plaintiff "at a very late date"; improperly hinted at the perceived problem, thereby precluding a truly unbiased assessment by Dr. Nudelman; and inappropriately revealed the name of the physician under review. On appeal, plaintiff argues, "The fact that [defendant's] inappropriately instructed and tampered-with 'outside' reviewer *testified*, as [defendant's] expert witness, at the Arbitration further violated [plaintiff's] fair procedure rights." (Orig. italics.)

No fair procedure violation occurred. Plaintiff directed the arbitrator's attention to the letter and argued its effect on Dr. Nudelman's assessment. Plaintiff declined to cross-examine Dr. Nudelman. The evidence that Dr. Nudelman's review was arguably biased as a result of Dr. Schottinger's letter was before the arbitrator. The arbitrator could consider that evidence in assessing the weight to be given Dr. Schottinger's testimony. Further, the arbitrator

could consider the letter in terms of Dr. Nudelman's review of the medical care provided by plaintiff to the patients in question.

2. Evidence of Altered Records

Plaintiff claims he presented evidence defendant had altered and otherwise tampered with evidence introduced at the arbitration hearing. The arbitrator impliedly rejected that assertion. Plaintiff argues, "[T]he [a]rbitrator's [f]indings failed to acknowledge the evidence of tampering." Plaintiff cites no legal authority for the proposition the arbitrator was required to make an express finding as to the evidence tampering claims. Pursuant to the bylaws, "Within thirty (30) days of completion of the hearing, the arbitrator shall make a report and recommendation in writing to the Executive Committee and to the Hospital Administrator, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached . . . ."

F. The Appellate Review Panel Hearing

1. By-law requirements

With respect to appellate review, defendant's medical staff bylaws provide: "1. If appellate review is timely requested by the appellant or the Executive Committee, *the Chairman of the Board of Directors shall appoint a three member Appellate Review Panel*, at least one of whom shall be a member of the Professional Staff of the Hospital who was not a witness at the prior hearing. The Chairperson of the Panel shall be selected by the Chairman of the Board of Directors. [¶] 2. *The appellate hearing* shall take place at a time and place agreed to by the Chairperson of the Appellate Review Panel and the appellant, preferably within sixty (60) days of receipt of the request for hearing, and *shall be based*

upon the prior hearing. No additional witnesses or evidence shall be presented unless the panel is convinced that the witnesses or evidence could not have been presented at the prior hearing. Each party shall have the right to appear and respond, may be represented by legal counsel and may present a written statement or brief and an oral presentation to the Appellate Review Panel. If the panel allows witnesses to appear before it, they may testify and be cross examined. The chairperson of the panel shall determine admissibility of evidence and appropriate procedures for examination of witnesses before the panel. [¶] 3. A verbatim record shall be ma[d]e of the appellate hearing. If either side chooses to engage a shorthand reporter, it shall bear the cost thereof. However, it shall make available to the other side, if requested, a copy of the transcript of the hearing at the cost of copying such transcript. [¶] 4. *Reasons for appeal and for reversal of the recommendations shall be procedural failure so as to deny a fair hearing, lack of a rational basis for the recommendations, or action taken arbitrarily or capriciously.* The panel may affirm, modify or reverse the recommendation. The panel also may remand the matter for further consideration of designated issues. In such instance the recommendations as to the designated may be reviewed by the Appellate Review Panel, in accordance with the procedures of this subsection, but following an expedited time frame, if feasible. [¶] 5. Upon receiving the written report of the Appellate Review Panel, which shall be due within thirty (30) days of completion of the hearing, the Chairman of the Board shall announce the Appellate Review Panel's decision in the matter as determined by majority vote. Such decision shall be transmitted to the Hospital Administrator, Chief of Staff, the Executive Committee, and to the appellant. Except in case of a remand, there shall be no further appeal to the Board of Directors or to the Professional Staff." (Italics added.)

2. Bias

Plaintiff asserts a violation of his fair procedure rights in that he was not given a sufficient opportunity to voir dire the members of the Appellate Review Panel to discover possible bias or conflicts of interest. The record does not support plaintiff's assertion.

At the outset of the appellate review hearing, plaintiff, who was no longer represented by counsel, stated, ". . . I had thought this was going to be a repeat of the arbitration . . . ." The chairperson of the Appellate Review Panel, Dr. Mary E. Reres, explained to plaintiff, "This is not a repeat of what you experienced during the arbitration hearing," and that review was limited to the three areas identified in the bylaws. Plaintiff then raised a second concern, as to the make-up of the Appellate Review Panel. Plaintiff stated, "And I do have further issues, and as I pointed out [previously,] thinking that this was going to be an arbitration hearing, that the people on the board . . . would be chosen in concert by the fact that all three have ties, and probably strong ties, can be an issue, and those ties being with Kaiser, and I would have hoped to have had a say in the choosing." Further, plaintiff stated, "[I]t would have been my preference to have had a panel that was non-Kaiser, non-Kaiser affiliated, and appointed in concert by the hospital and by myself." Plaintiff wanted to know what the panelists' "feeling[s]" were on that point. Plaintiff sought to ask the panelists, "[S]hould Dr. Jaffe have had a say in the choosing of the panelists, and should they have been from non-Kaiser surroundings." The chairperson, Dr. Reres, responded, "The panel cannot act in opposition to the bylaws, period." Later, Dr. Reres stated, "[The panel] cannot have an opinion different than the bylaws in the organization of this meeting." Nevertheless, Dr. Reres allowed the panel members to respond to plaintiff's questions.

The foregoing exchange demonstrates plaintiff's attempt to voir dire the members of the Appellate Review Panel concerning possible bias was limited to two specific questions. The questions related to the Appellate Review Panel's composition. Moreover, the panel members answered those questions. Plaintiff made no attempt to ask further questions. On this record, plaintiff's assertion his fair procedure rights were violated in that he was not given a sufficient opportunity to voir dire the members of the Appellate Review Panel to discover possible bias or conflicts of interest is without merit. Finally, we note there is no evidence of any bias on the part of the Appellate Review Panel members.

3. Medical records

Plaintiff contends the Appellate Review Panel could not have properly reviewed the record of the formal hearing because it admitted it did not review "*any*" medical records. Plaintiff argues: "[Plaintiff's] contention [in the trial court] was not that [the Appellate Review Panel] should have reviewed 'all' medical records, but that the [panel] admitted it was not provided with, nor had it reviewed 'any' of the medical records. [Citation.] Therefore, the issues [plaintiff] raised before the [Appellate Review Panel], including [defendant's] tampering with and misreporting of the medical records, and the Arbitrator's disregarding of the evidence regarding the medical records could not have been reviewed by the [panel] because the [panel] did not have 'any' medical records to decide these issues. [¶] . . . [¶] Furthermore, it was improper for the [Appellate Review Panel's] Findings to state conclusions regarding the medical records without reviewing any medical records."

The record does not support plaintiff's claim. At the outset of the Appellate Review Panel hearing, while plaintiff was attempting to clarify the scope of the hearing, the

following transpired: "Dr. Robert Jaffe: And were all 32 volumes of the transcripts read by the panelists? Is that what I understand? [¶] Dr. Reres: Yes. [¶] Dr. Robert Jaffe: And were all the exhibits all read? [¶] Dr. Reres: The exhibits were read. [¶] Dr. Robert Jaffe: Medical Records all studied? [¶] Dr. Reres: No, medical records were not presented, only the materials that were available during the arbitration process. [¶] [Legal Advisor to the Panel]: The medical records are available, and should there be any reason to go back and look at them, the panel will do that. They are available. [¶] Dr. Robert Jaffe: Thank you." The foregoing was not a concession by the Appellate Review Panel that it had not reviewed *any* medical records. Dr. Reres simply stated the panel had reviewed the record of proceedings before the arbitrator, including exhibits. In other words, the Appellate Review Panel in reaching its decision considered the entire record of the arbitration hearing.

4. Findings

Plaintiff contends the Appellate Review Panel failed "'to articulate a connection between the evidence produced at the hearing and the decision reached,'" and "to reveal the analytic route . . . traveled from evidence to action" in violation of section 809.4, subdivision (a)(1). Section 809.4, subdivision (a) provides: "Upon the completion of a hearing concerning a final proposed action for which a report is required to be filed under Section 805, the licentiate and the peer review body involved have the right to receive all of the following: [¶] (1) A written decision of the trier of fact, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached. [¶] (2) A written explanation of the procedure for appealing the decision, if any appellate mechanism exists." The written decision referred to in section 809.4, subdivision (a)(1) is that of the trier of fact—in this case, the arbitrator who presided over the formal hearing.

In other words, section 809.4, subdivision (a), required the arbitrator, not the Appellate Review Panel, to issue a written decision identifying the connection between the evidence produced at the hearing and the ultimate decision. This is consistent with the Supreme Court's decision in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515, which the trial court cited. Plaintiff does not contend the arbitrator's findings were deficient.

5. Medical Board of California

Plaintiff introduced new evidence before the Appellate Review Panel. Plaintiff presented evidence that, on March 19, 1998, the Medical Board of California notified him it had closed its investigation—prompted by defendant's section 805 report—and stated "[W]e have found no deviation from the Standard of Care in the Community as related to the information that has been reviewed." The Appellate Review Panel considered that letter and related argument in reaching its decision. While plaintiff's argument is not entirely clear, he apparently contends the Appellate Review Panel misconstrued, disregarded, or gave insufficient weight to the medical board's findings. The medical board's decision was not binding on defendant. (See *Bonner v. Sisters of Providence Corp., supra,* 194 Cal.App.3d at pp. 444-447.) Under the bylaws, the weight to be accorded the medical board's decision was a question for the Appellate Review Panel. Also pursuant to the bylaws, the Appellate Review Panel could reverse the recommended administrative action for: denial of a procedurally fair hearing; lack of a rational basis for the recommendation; or arbitrary or capricious action taken. Plaintiff has not argued nor shown that the medical board's decision compelled a reversal of the recommended administrative action.

G. The Syringe Reuse Charge

Defendant's Executive Committee charged in part that plaintiff had maintained an inappropriate practice of using the same syringe for injecting different patients. As noted above, the arbitrator found plaintiff had, on at least one occasion, used a single syringe to inject multiple patients, a practice not only below the community standard of care, but "intolerable" and exhibiting "an astonishing lack of judgment." Plaintiff concedes there was an initial incident when he used the same syringe (with a new needle each time) on multiple patients. He argues, however, that there was no substantial evidence he repeated that practice. Moreover, plaintiff contends the arbitrator's finding of at least one occasion improperly varied from the charge that he maintained a practice of misconduct, thereby circumventing defendant's burden of proof as to the charge. In other words, plaintiff asserts the termination of his staff membership and hospital privileges was upheld for reasons other than those set forth in the statement of charges. Plaintiff cites no legal authority for the proposition the arbitrator's finding could not vary in any degree whatsoever from the specific misconduct charged. Moreover, the arbitrator did not consider evidence of uncharged misconduct and limited his findings to issues raised by the statement of charges. Under these circumstances, we find no improper prejudicial variance between the acts charged and the arbitrator's findings. (*Cook v. Civil Service Commission* (1960) 178 Cal.App.2d 118, 133.)

IV. DISPOSITION

The judgment is affirmed. The order denying the motion to vacate the judgment is affirmed. Defendants, Kaiser Foundation Hospital—Panorama City, Southern California

Permanente Medical Group, and Kaiser Health Plan, Inc., are to recover their costs on appeal from plaintiff, Robert Jaffe, M.D.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J. ARMSTRONG, J.

A-20

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 5

December 21, 2004

Robert J. Jaffe M.D.
22141 Burbank Blvd.
Suite 5
Woodland Hills, CA 91367

Robert J. Jaffe, M.D.
v.
Kaiser Foundation Hospital, et al.

B166698
Los Angeles County No. BS069856

THE COURT:

Petition for hearing is denied.

cc: All Counsel
File

2nd Civil No. B166698

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT J. JAFFE, M.D.
Appellant,

vs.

KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP,
And Does 1-100, inclusive,
Respondents.

SUPPLEMENTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

ROBERT J. JAFFE, M.D.
22141 Burbank Blvd., Suite 5
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Appellant in Pro Per

2nd Civil No. B166698

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

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And Does 1-100, inclusive,
Respondents.

SUPPLEMENTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

Pursuant to Evidence Code section 459, Appellant in pro per, ROBERT J. JAFFE, M.D., requests that the Court take Judicial Notice of new decisional case law, unavailable to be cited at the time briefs were first submitted: Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th. This case speaks on subject matter at issue in this appeal and upon which this appeal is based. The subject matter that this case speaks upon is already thoroughly addressed in Appellant's briefs both before the lower court and this court.

This new case law of which Appellant requests that the court take judicial notice, is of substantial consequence to the determination of this action:

REQUEST FOR JUDICIAL NOTICE

1. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Id.* at pp. 1031-1032.) We believe that the circumstances presented in this case fall within the ambit of *Haas*. Pursuant to Appendix Section II(G) of the hospital bylaws, the MEC unilaterally appointed Justice Agliano as hearing officer, and his fee was paid by the hospital."

2. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "We also acknowledge that there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case. As both the ARP and the trial court observed, "the administrative record shows that the present hearing was conducted fairly and even-handedly by the presiding officer." The court further noted that in a previous {Slip Opn. Page 13} proceeding conducted by Justice Agliano the Hearing Panel had ruled in favor of the physician. Nevertheless, the Supreme Court emphasized in *Haas* that "the risk of bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator." (*Haas, supra,* 27 Cal.4th at p. 1030.) " 'The Court's inquiry . . . is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man" as judge.' " (*Id.* at p. 1029.)"

3. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "Code of Civil Procedure section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she "has a financial interest in the subject matter in a proceeding or in a party to the proceeding." And Canon 2 of the Code of Judicial Ethics states that a judge "shall avoid impropriety and the *appearance* of impropriety in all of the judge's activities." (Italics added.) The commentary to this canon provides an objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (See, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336.) Measured by these standards and underlying principles, SVMHS's procedures for appointing hearing officers were not consistent with the appearance of impartiality. Appellant's objection on this ground was sound, and his petition for a writ of mandate should therefore have been granted. {Slip Opn. Page 14}."

4. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "We do caution, however, that if an appellate review hearing does take place without counsel for either side, it would strain the bounds of due process to allow the hospital's attorney, who took an active role in assisting the MEC to bring charges against appellant, to serve as advisor to the board in the hearing. (See *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94 [city attorney's assistance and advice to hearing officer at administrative review hearing constituted an impermissible "overlapping of advocacy and decisionmaking roles" in violation of due process, as attorney had taken an active and significant role as advocate for the city in prior proceedings]; see also *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 814-816 [city attorney's

interactions with board on other occasions suggested probable influence and appearance of unfairness].)"

5. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "The rule against overlapping functions . . . applies to prevent participation at ascending levels of the process, so that a participant will not be in the position of reviewing his own decision or judging a man whom he has either charged or investigated." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 499.)"

6. Apropos of the above, Appellant further requests that the court take judicial notice of an easily verifiable fact, pursuant to 452(h), that the Arbitrator who heard this matter, Daniel H. Willick, frequently serves as hearing officer, arbitrator and general counsel to hospitals. This fact is verifiable by his curriculum vitae at the time at issue in 1995, and more thoroughly verifiable by his curriculum vitae currently posted on the Internet, www.Nossaman.com, (click on healthcare, then click on Daniel H. Willick). The two curricula vitae are nearly identical.

7. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th states: "Whether the hospital's determination was made according to a fair procedure is a question of law, which we consider independently based on the administrative record." (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)"

DATED: October 8, 2004

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Appellant in Pro Per

MEMORANDUM OF POINTS & AUTHORITIES

1. Because Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th Is New Case Law it Therefore Could Not Have Been Included in Appellant's Reply Brief Before This Court.

Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th became decisional law on September 16, 2004, and was published on Friday, September 17, 2004, six months after Appellant's Opening Brief was due and only three days before Appellant's Reply Brief was due on Monday, September 20, 2004. Appellant did not become aware of this new case law until approximately two weeks after it was published. It was impossible to include this case law in Appellant's Opening Brief and all but impossible to include same in Appellant's Reply Brief. However, as shown in Appellant's Declaration attached hereto, the case law quotations from Yaqub, supra, cited in this request for judicial notice herein speaks on subject matter that is already thoroughly addressed in Appellant's briefs both before the lower court and this court.

2. Appellant Requests that the Court Take Judicial Notice Under Evidence Code Section 459, Pursuant to Appellate Court Rule 5.

Appellate Court Rule 5 states that Requests for Judicial Notice under Evidence Code section 459 shall be submitted in a separate motion, served on all parties, and accompanied by a proposed order.

Appellate Court Rule 5 states as follows:

"Rule 5. Requests for Judicial Notice Requests that the Court take judicial notice under Evidence Code section 459 shall be submitted in a separate motion, served on all parties, and

accompanied by a proposed order. These requests shall not be made in the body of a brief or included as an attachment to a brief."

In compliance with Appellate Court Rule 5, Appellant has submitted this Supplemental Request for Judicial Notice in a separate motion, served it on all parties and has attached a proposed order with this motion.

3. Evidence Code Section 451 States that Judicial Notice Shall be Taken of Decisional Law.

Evidence Code section 451:

"451. Judicial notice *shall* be taken of the following:
(a) The *decisional, constitutional, and public statutory law of this state* and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution..." (Emphasis added.)

Since Yaqub, supra is case decisional law, it is therefore proper subject matter for Judicial Notice pursuant to Evidence Code 451.

4. Evidence Code section 452 states that Judicial Notice May be Taken of Facts That are Not Reasonably Subject to Dispute and Are Capable of Immediate And Accurate Determination By Resort To Sources Of Reasonably Indisputable Accuracy.

Evidence Code section 452:

"452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
...(h) *Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate*

determination by resort to sources of reasonably indisputable accuracy." (Emphasis added.)

Since the fact that the Arbitrator in this matter, Daniel H. Willick, "frequently" acts as hearing officer, arbitrator and general counsel to hospitals is a relevant issue in this matter, and is easily verifiable by his curriculum vitae at the time at issue in 1995, and is also verifiable by his curriculum vitae currently posted on the Internet, www.Nossaman.com, (click on healthcare, then click on Daniel H. Willick), this fact is therefore proper subject matter for judicial notice pursuant to Evidence Code section 452(h).

5. Evidence Code Section 453 States that the Trial Court Shall Take Judicial Notice of Any Matter Specified in 452, if a Party Requests it, Gives Each Adverse Party Sufficient Notice Of The Request, And Furnishes The Court With Sufficient Information To Enable It To Take Judicial Notice Of The Matter.

Evidence Code section 453:

"The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:
(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter."

Evidence Code section 451 mandates that judicial notice be taken of case decisional law. Because Yaqub, supra is new case decisional law, Appellant's request that judicial notice be taken of it, should not be barred because it was not published in time for it to be cited in Appellant's briefs. As shown in Appellant's declaration attached hereto, the subject matter that Yaqub, supra, speaks upon, as quoted

in this Request for Judicial Notice, is fully cited in Appellant's Briefs both before the lower court and this court.

Evidence Code section 453 states that judicial notice shall be taken of case law, if the adverse party is given sufficient notice of the request for judicial notice to enable such adverse party to prepare and meet the request.

Accordingly, if the Court believes that November 1, 2004, the date that the hearing in this matter is scheduled, is not sufficient time for the adverse party to respond to this new case law, then Appellant would have no objection to the Court rescheduling the hearing in this matter until such time as the court deems as adequate time for the adverse party to respond.

In the alternative, the court may wish to grant both parties the opportunity to argue the relevance of this new case law in a supplemental brief, with a word limit and extension of time as the court so deems.

DATED: Respectfully Submitted,

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.,
Appellant in Pro Per

DECLARATION OF ROBERT J. JAFFE, M.D.

I, Robert J. Jaffe, M.D., declare as follows:

1. I am the Appellant in Pro Per in this appeal.

2. The purpose for filing this Supplemental Request for Judicial Notice is for the court to take judicial notice of new case law, Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th.

3. Yaqub v. Salinas Valley Memorial Healthcare System (2004) Cal.App.4th became decisional law on September 16, 2004, and was published Friday, September 17, 2004, three days before my Reply Brief was due on Monday, September 20, 2004.

4. I did not become aware of this new case law until approximately two weeks after my Reply Brief was filed.

5. Each aspect of this new case law about which I have requested that the Court take judicial notice is at issue in my appeal, and upon which my appeal in part is based.

6. Each aspect of this new case law about which I have requested the Court take Judicial Notice, speaks on subject matter already addressed in my briefs:

(1) Judicial Notice item 1 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 34, lines 9-14; Appellant's Opening Brief, p. 24:L.16-21; and Appellant's Reply Brief, P. 19, lines 3-10;

(2) Judicial Notice item 2 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court,

p. 34, lines 9-14; Appellant's Opening Brief, p. 24:L.16-21; and Appellant's Reply Brief, P. 19, lines 3-10;

(3) Judicial Notice item 3 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 34, lines 9-14; Appellant's Opening Brief, p. 24:L.16-21; and Appellant's Reply Brief, P. 19, lines 3-10;

(4) Judicial Notice item 4 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 5-6; Appellant's Opening Brief, p. 28 and Appellant's Reply Brief, P. 28-29;

(5) Judicial Notice item 5 is a quotation from Yaqub, supra, that speaks on subject matter thoroughly addressed in Petitioner's Opening Brief before the lower Court, p. 4-5; Appellant's Opening Brief, p. 18-19; and Appellant's Reply Brief, P. 16-18;

(6) Judicial Notice item 6 is a quotation from Yaqub, supra, that speaks on an matter thoroughly addressed in Appellant's Reply Brief, p. 19 and Resp.1910.

(7) Judicial Notice item 7 is a quotation from Yaqub, supra, that speaks on an matter thoroughly addressed in Appellant's Opening Brief, page, 5 Appellant's Reply Brief, p. 2.

7. Each matter stated herein on which I request that the court take judicial notice is of substantial consequence to the determination of my case on appeal.

8. The matters on which I request that the court take judicial notice herein are proper matters for judicial notice pursuant to Evidence Code sections 451(a) and 455(h).

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: October 8, 2004

/s/ Robert J. Jaffe, M.D.
ROBERT J. JAFFE, M.D.
Appellant in Pro Per

ORDER

IT IS SO ORDERED THAT APPELLANT'S SUPPLEMENTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE IS GRANTED.

DATED: _____

PRESIDING JUSTICE

DECLARATION OF SERVICE BY MAIL

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am over eighteen years of age, and not a party to the within cause. I am a resident of the County of Los Angeles, State of California. My business address is 22141 Burbank Blvd., #5 Woodland Hills, California 91367.

I served the foregoing SUPPLEMANTAL REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE on all the interested parties named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail in the city of Los Angeles, California, addressed to the offices or residences as follows:

Foley & Lardner
2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3021
Attn: Sarah G. Benator, Esq.
Lowell C. Brown, Esq.

[Respondents, KAISER FOUNDATION HOSPITAL, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP; KAISER HEALTH PLAN, INC.]

Executed on October 11, 2004, at Los Angeles, California

/s/ Robin DeMichael.
Robin DeMichael

Oct-05-1994 Wednesday 11:05 ID: Daniel H. Willick Fax No. 310-286-04887 #804 PO2

DANIEL H. WILLICK
Attorney at Law
1999 Avenue of the Stars
Twenty-Seventh Floor
Los Angeles, CA

Telephone: 310) 286-0485
Facsimile: (310) 286-0487

Legal Experience:

Daniel H. Willick has practiced law since 1973, with an emphasis on healthcare law and complex civil litigation, including financial institutions law, securities law and bankruptcy. In addition to his active litigation practice, Dan acts as general counsel to the Medical Staff at Queen of Angels-Hollywood Presbyterian Medical Center, the California Psychiatric Association, the Southern California Psychiatric Society, the Southern California Psychoanalytic Institute, the Los Angeles Psychoanalytic Society and Institute and the Chief of Staff at Cedars-Sinai Medical Center, Los Angeles. He has extensive experience concerning healthcare issues.

Dan has expertise in handling medical staff corrective action hearings. He has prepared medical staff bylaw provisions governing such hearings, frequently acted as a hearing officer, represented medical staffs and professional societies at such hearings, and successfully defend court challenges to such hearings.

Dan has successfully represented and advised medical staffs in disputes over medical staff self-governance, including representing the Medical Staff of Eisenhower

Memorial Hospital in the Eisenhower Memorial Hospital v. Stoltzman, et al. lawsuit (California Court of Appeals for the Fourth Appellate District, Case No. 4th Civil No. E006571), and representing the Medical Staff of Queen of Angeles-Hollywood Presbyterian Medical Center in successfully resisting efforts by the hospital administration to usurp the medical staff's authority to control quality assurance. He represented the California Psychiatric Association in the post-appeal proceedings implementing the California Supreme Court's decision on medical staff privileges in California Association of Psychology Providers v. Rank (1990) 51 Cal.3d 1.

Appellate courts, including the California Supreme Court, have adopted positions Dan has taken in amicus curiae briefs on the confidentiality of medical records in Mendendez v. Superior Court, (1992) 3 Cal.4th 435 and Scull v. Superior Court, (1988) 206 Cal.App.3d 784.

DANIEL H. WILLICK

Other Legal Experience:

Representing of healthcare providers in a Federal Trade Commission investigation;

Successful insurance coverage litigation on behalf of a financial institution against directors' and officers' liability insurance carriers;

Real estate litigation in test cases successfully defending the right of federally-chartered savings and loan association to enforce due-on-sale clause;

Successful defense challenges under the Community Reinvestment Act to mergers of financial institutions;

Securities litigation, including defense of Class Securities Litigation, including defense of class actions, and shareholder derivative suits against a multi-billion dollar financial institution;

Representative of parties in litigation and administrative proceedings concerning hostile takeovers of financial institutions;

Representation of a bankruptcy trustee as special counsel prosecuting over 170 cases to obtain additional capital contributions from investors in a failed securities broker dealer;

Representation of multiple creditors in three separate bankruptcy proceedings, each involving the liquidation of a government securities broker dealer;

Litigation concerning the rehabilitation and liquidation of a major mortgage guaranty insurer;

Successful defense of lawsuit brought by the Federal Deposit Insurance Corporation seeking rescission of merger of several banks in Florida;

Tax refund litigation; and

Representation of attorneys in law firm dissolutions and representation of physician in medical practice dissolution.

Admitted to Practice of Law:

California, 1973
United States District Court, Central District of California, 1973
Ninth Circuit Court of Appeals, 1975
United States District Court, Eastern District of California, 1979
United States District Court, Northern District of California, 1982
United States Supreme Court, 1982
District of Columbia, 1982
United States District Court, Southern District of California, 1986

Education:

Dan has an extensive and varied academic background. He was a Russell Sage Foundation Fellow in Law and Social Science and attended the U.C.L.A. School of Law, where he was initiated into the order of Coif, and was awarded a J.D. in 1973. Among other honors, Dan received a National First Prize in the Association of Trial Lawyers of America Environmental Law Essay Contest, is a member of Phi Beta Kappa and was selected as a Woodrow Wilson Fellow. He also holds a Ph.D. from the University of Chicago and has worked extensively in both the academic and legal fields, having taught at the University of California at Los Angeles, the University of California at Santa Barbara, California State University, Los Angeles and Loyola Law School. Dan presently holds an appointment as a Lecturer at the U.C.L.A. School of Medicine. He has published articles on a wide variety of legal and other topics.

U.C.L.A. School of Law J.D. (top 10% of class) 1973

University of Chicago 1968	Ph.D. (Sociology)
University of Chicago 1966	A.M. (Sociology)
U.C.L.A. 1964	A.B. (highest honors)

Academic Honors:

Order of the Coif
Phi Beta Kappa
National First Prize – Association of Trial Lawyers of America Environmental Law Essay Contest, 1973
Russell Sage Foundation Resident in Law and Social Science, 1970-1972
National Defense Education Act Fellow, 1965-1967
Woodrow Wilson Fellow, 1964-1965
Research grants from the University of California Academic Senate, 1967-1973
Offered Ford Foundation Faculty Fellowship for 1970-1971
President, U.C.L.A. Chapter of Pi Sigma Alpha

Publications:

"Contracts To Provide Psychiatric Services Through Health Care Organizations", 7 California Psychiatric Association Newsletter 4 (March, 1993);
"Attacks on Medical Staff Self-Governance Intensify", 37 Southern California Psychiatrist 3 (April, 1989);
"Social Class as a Factor Affecting the Judicial Disposition...", Criminology (1975);
"Rule Enforcement by the Los Angeles Air Pollution control District, 3
Ecology Law Quarterly 507 (1973)

"Survey question order . . .", 35 Public Opinion Quarterly 189 (1971)

"Foreign Affairs and Party Choice", 75 American Journal of Sociology 530 (1970)

Other publications not listed.

Law-Related Community Service:

Member, Board of Directors (1981-Present) and Vice-President (1983-1989) of Constitutional Rights Foundation
Member, Board of Directors (1990-1993) of Harvard Water Polo Foundation
Pro bono representation of parents in Los Angeles public school desegregation case, 1977-1978
Member, Los Angeles County Bar Association Delegation to the State Bar Convention, 1975, 1976 and 1977

Employment History:
Law:

Law Offices of Daniel H. Willick, Los Ageles, June 1993 to present, also Of Counsel to Pircher, Nichols & Meeks
Partner, Varet Marcus & Fink (formerly Milgrim, Thomajan & Lee) Los Angeles, October, 1990-May, 1993
Of Counsel, McKenna & Fitting, Los Angeles, September-October, 1990
Associate, McKenna & Fitting, Los Angeles, 1978-1980
Associate, Greenberg, Bernard, Weiss & Karma; Ellis J. Horvitz, Los Angeles, 1975-1968
Summer Associate and Associate, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Summer 1972, 1973-1975

Academic Appointments

Lecturer, Department of Psychiatry, U.C.L.A. School of Medicine, 1993 to present

Adjunct Professor of Law (part-time) Loyola Law School, Los Angeles, 1977-1978
Lecturer in Sociology (part-time) U.C.L.A., 1975-1977
Assistant Professor of Sociology (part-time), California State University at Los Angeles, 1970-1971
Assistant Professor of Sociology, University of California at Santa Barbara, 1967-1973

References available upon request.

PEOPLE

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Los Angeles, CA 90071-1602
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Practice Areas:
Healthcare
Employment
Fraud & Abuse
Healthcare Professional Licensing and Peer Review
HIPAA
Hospitals and Health Facilities
Managed Care
Medical Research
Peer Review
Professional Societies and Associations
Litigation
Complex Civil Litigation

Professional Profile:

Dan has practiced law since 1973, with an emphasis on healthcare law and complex civil litigation. He has been involved in precedent-setting lawsuits concerning important healthcare issues. As general counsel to a number of healthcare organizations, Dan regularly advises boards of directors, negotiates contracts with employees and lobbyists, and follows and advises on proposed healthcare legislation and regulations. He serves as legal counsel to a political action committee as well as to educational programs for students receiving psychoanalytic training. Additionally, Dan

advises on the operation of clinics providing psychotherapy and other medical services.

Dan's expansive healthcare practice includes representing physicians and other healthcare providers before licensing boards and in medical staff corrective action hearings. He frequently acts as a hearing officer or arbitrator in medical staff hearings. Dan has prepared medical staff bylaw provisions governing peer review hearings and has represented medical staffs and professional societies at such hearings.

He is a Clinical Assistant Professor at the Keck School of Medicine at the University of Southern California and has also held academic appointments at Loyola Law School, UCLA, University of California at Santa Barbara and California State University at Los Angeles.

Representative Work:

Menendez v. Superior Court (1992) 3 Cal. 4th 435 -The California Supreme Court adopted positions on confidentiality and privilege put forward in an amicus curiae brief on behalf of the California Psychiatric Association.

California Association of Psychology Providers v. Rank (1990) 51 Cal.3d 1 - Represented the California Psychiatric Association in proceedings to implement the California Supreme Court's opinion concerning medical staff issues.

Ford v. Norton (2001) 89 Cal. App. 4th 974 - The Court of Appeal adopted positions propounded in an amicus curiae brief regarding immunity from malpractice claims for early release of patient from an involuntary hold.

In re Family Health Services, Inc. (9th Cir. B.A.P. 1991) 130 B.R. 314 - Represented an HMO that successfully reorganized in a bankruptcy proceeding.
Eisenhower Memorial Hospital v. Stoltzman, et al. (California Court of Appeal for the Fourth Appellate District, Case No. 4th Civil No. E006571) - Successfully handled dispute over medical staff self-governance.

Great American Bank. Represented this multi-billion dollar bank in the defense of class actions and shareholder derivative suits. Successful litigation on behalf of the bank to obtain directors' and officers' liability insurance coverage.

In re: Comark. Successful prosecution of involuntary Chapter 7 bankruptcy of failed government securities broker dealer.

Serves as General Counsel to California Psychiatric Association, Southern California Psychiatric Society, Orange County Psychiatric Society and advises other non-profit medical professional societies and associations.

Presentations and Publications:

"The Perfect Storm-Multiple Problems When A Physician Is Accused of Deficient Care," Health Lawyers Weekly, April 30, 2004.
"Liability of the Forensic Psychiatrist," co-author of a chapter in R. Rosner, M.D. (ed.), Principles and Practice of Forensic Psychiatry, Oxford University Press, 2002.
"Confidentiality of Psychotherapy and the Possible Release of Information to Family Members," 11 The Journal of NAMI California 78, September, 2000.
"Contracts To Provide Psychiatric Services Through Health Care Organizations," 7 California Psychiatric Association Newsletter 4, March, 1993.

"Attacks On Medical Staff Self-Governance Intensify," 37 Southern California Psychiatrist 3, April 1989.
"Social Class as a Factor Affecting the Judicial Disposition...," Criminology, 1975.
"Rule Enforcement by the Los Angeles Air Pollution Control District," 2 Ecology Law Quarterly 507, 1973.
Presenter, "Common Risks Of Malpractice, Peer Review and Licensing Board Claims In The Practice Of Medicine" UCLA Psychiatry Residents (February 2004)
Professional Affiliations:
USC Medical School, UCLA Medical School and California Psychiatric Association, frequent volunteer lecturer, 1990 – present.
Santa Barbara County Air Pollution Control District Hearing Board, Former Member, 1999-2000 and Vice Chairperson, 2000-2002.
Federal Bar Association Delegation to the State Bar Convention, Member, 1995.
Constitutional Rights Foundation, Former Director, 1981-1994, and Vice-President, 1983-1989.
Los Angeles County Bar Association Delegation to the State Bar Convention, Member, 1975-1977.

Education:
J.D., University of California, Los Angeles, 1973
Ph.D., University of Chicago, 1968
A.M., University of Chicago, 1966
A.B., University of California, Los Angeles, 1964

Honors and Awards:

Recipient of the California Psychiatric Association's Edwin Rudin, M.D., Award for Excellence in Government Relations, 2000
Order of the Coif, UCLA School of Law, 1973
National First Prize (co-recipient) Association of Trial Lawyers of America environmental Law Essay Contest, 1973

Russell Sage Foundation Resident in Law and Social Science, UCLA School of Law, 1970-1972
Phi Beta Kappa, UCLA, 1964

Admitted:

California
The United States Supreme Court
United States Ninth Circuit Court of Appeals
United States District Courts for the Southern, Central, Northern and Eastern Districts of California
District of Columbia (Inactive)

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122 Cal.App. 4th 474

- Cal.Rptr.3d -

NIZAR YAQUB, Petitioner and Appellant,
v.
SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, et. al., Defendants and Respondents.

H2064628
California Court of Appeal, Sixth District
September 16, 1004

(Superior Court of Monterey County, No. M61353, Robert O'Farrell, Judge.)
(Opinion by Elia, J., with Rushing, P. J., and Premo, J., concurring.)

COUNSEL

Spiegel, Liao & Kagay and Charles M. Kagay, for Appellant. Abramson, Church & Stave, Kelly McCarthy Sutherland and Hanson; Bridgett, Marcus, Vlahos & Rudy, Michael A. Duncheon and Jacquelyn J. Garman, for Respondents.

OPINION
ELIA, J.-

In this appeal Nizar Yaqub, M.D., seeks review of the superior court's denial of his petition for a writ of mandate and his motions for vacation of judgment and a new trial. He contends that the petition should have been granted because respondent, Salinas Valley Memorial HealthCare System (SVMHS), denied him a fair administrative hearing before revoking his hospital privileges at Salinas Valley Memorial Hospital (SVMH or the hospital). Appellant specifically

contends that the presiding officer at the hearing before the Fair Hearing Panel had a financial conflict of interest that should have disqualified him from conducting the hearing. He also contends that the presiding officer improperly denied him the opportunity to present testimony of the physicians who had signed the charging documents. Appellant further argues that the composition of both the Hearing Panel and the Appellate Review Panel (ARP) violated his right to due process and a fair procedure because the panels comprised the same people who had suspended his hospital privileges in a prior proceeding. The appellate review process, appellant contends, was also unfair because the ARP sought advice from an attorney who had advocated against him in the matter, and because it "revers[ed] an unappealed finding" of {Slip Opn. Page 2} the Hearing Panel and substituted its own factual findings. Finally, appellant contends that the Hearing Panel's determination that he failed to provide for the care of his patients is not supported by substantial evidence.

We agree with appellant that the hearing officer should not have presided over appellant's Fair Hearing. Accordingly, we will reverse the judgment. We reach additional issues only where necessary to guide the parties in any further proceedings in this matter.

Background

Appellant's privileges at SVMH were restricted in a previous proceeding before a review panel of the SVMHS board of directors. That matter culminated in a decision on July 13, 2001 in which the board suspended his surgical privileges except for Caesarean sections. The board ordered him to take courses on interpersonal relations within three months and refrain from performing procedures for which he was not credentialed. The board also ordered appellant to submit to the hospital's Medical Executive Committee (MEC) a plan naming the physicians who would care for his patients during his 90-day suspension. Appellant was informed that if he

violated any applicable bylaws, rules, or regulations, he would be summarily removed from the hospital staff. Appellant's petition for a writ of administrative mandamus was denied by the superior court, and this court upheld that ruling in an opinion filed January 15, 2004 (H024953).
On July 16, 2001, in accordance with the board's suspension order, appellant was instructed to submit his plan for his patients' care within three days. Appellant was told to coordinate the plan with Dr. David Perrott, a vice president and medical director at the hospital. Appellant requested a two-week extension to allow time for "an orderly transition of care for his patients during the period of the suspension." The hospital granted him a six-day extension for only non-elective obstetrical procedures. In the same letter, which was addressed to appellant's attorney, Arnold B. Myers, the hospital's attorney, noted that it was "Dr. Yaqub's responsibility to contact his patients and make {Slip Opn. Page 3} arrangements with them to provide for their care at Natividad, another hospital in the area, or with another practitioner. Dr. Yaqub should understand that this implementation schedule must be rigidly adhered to so he will be in compliance with the Board of Directors' Decision."

On July 24, 2001, appellant's attorney, Barry King, notified counsel for the hospital that despite a "desperate effort" appellant had been unable to find anyone to cover his practice. According to King, appellant had expected that Drs. Halfpenny and Ross would provide coverage, but they had just informed him that they were not able or willing to do so. fn. 1 None of the other physicians with staff privileges at the hospital were willing to take his patients. Appellant refused to "coerce or force" any of his patients to deliver their babies at a hospital they did not choose, even though he had privileges at Natividad Medical Center (Natividad), also in Salinas. Appellant requested that the hospital *require* the other OB-GYN physicians to cover his patients. Alternatively, he requested a further extension for a

"sufficient" period to enable him to find "the appropriate medical personnel" to care for his patients.

The hospital rejected both proposals. Myers responded the next day that Natividad was an accredited facility specializing in obstetrical care. Myers stated that appellant had a duty to inform his patients by July 25 that (1) he could deliver their babies at Natividad; (2) they could arrange for care by other obstetricians in the community; and (3) if they appeared at SVMH without an assigned physician, they would be cared for by the obstetrician on call.

Dr. Perrott incorporated this statement into a memorandum distributed to the obstetrical physicians at the hospital. The memo, prepared by Dr. Perrott in consultation {Slip Opn. Page 4} with appellant, briefly explained that appellant had the responsibility to inform his patients that (1) he had privileges at Natividad; (2) patients could arrange for care from other physicians in the community; and (3) if they went to SVMH without an assigned physician they would be cared for by the physician for unregistered obstetrical services. The memo specifically warned the staff that "there may be Dr. Yaqub patients presenting to SVMH for obstetrical care." fn. 2 Appellant regarded the memo as equivalent to the required plan for coverage. He believed that he had a plan as of July 24: that the obstetrician on call would deliver the babies of his patients who came to the hospital. After receiving no objection for 30 days, he assumed the plan was accepted. Dr. Perrott testified, however, that he had not intended in the memo to communicate any commitment by the hospital to care for unassigned patients; the only purpose of the reference to the on-call physician was to ensure the staff's compliance with all applicable laws prohibiting the refusal of care to women in active labor.

Effective July 29, 2001, appellant resigned from the medical staff at Natividad. Beginning August 2, 2001, patients began

appearing at SVMH, unaware that appellant's privileges had been suspended and expecting him to deliver their babies. In each case the obstetrician on call handled the delivery. On August 23, 2001, Sam Downing, the president and CEO of the hospital, wrote to appellant and King, stating that appellant had not complied with several requirements of the July 13, 2001 decision, including the order that he provide a plan of care for his patients and notify them of his suspension. In the hospital's view, this failure, together with the resignation of his privileges at Natividad, raised "serious questions of abandonment of his patients. At this point, his patients are {Slip Opn. Page 5} left without a choice: they do not know he has no privileges at Salinas Valley Memorial Hospital; he cannot care for them at Natividad Medical Center by his own volition; and they have not been transferred to a physician who has taken over for Dr. Yaqub." Downing also asserted that appellant had not taken the required courses on interpersonal relations and had not completed his patient medical records by July 19, 2001. The hospital demanded that appellant complete those records and submit a written plan of care to Dr. Perrott within 24 hours. The next day appellant's attorney notified Dr. Perrott that appellant had completed the records, that patients had and were being told about the suspension, that appellant was still seeking a temporary replacement (*locum tenens*), and that letters had been sent to all staff OB/GYN physicians asking for their assistance in covering appellant's practice. The following week King announced that all prenatal records through the end of September 2001 had been sent to the hospital, and he sent Dr. Perrott a proposal for a course in conflict resolution.

On September 7, 2001, Myers notified King that appellant had not yet "presented a comprehensive written plan of care" for his patients. The matter was referred to the hospital's Medical Executive Committee (MEC) for review. King responded immediately, pointing out that appellant had asked

for coverage from Dr. Gilbert, a physician in another practice, but had yet received no response. Arranging *locum tenens* was a time-consuming process, King noted. Drs. Ross and Halfpenny, however, were expected to be available to cover urgent-care patients. King also told Myers that appellant had more than 65 patients with delivery dates projected for the suspension period, and that the "vast majority" of the OB-GYN community had privileges at SVMH but were hostile toward appellant. Myers rejected these excuses, reminding King that it was appellant's, not the hospital's, obligation to provide a plan for coverage, and insisting that the hospital's emergency room was not such a plan. On September 12, 2001, Myers provided King with a list of sources appellant could use for *locum tenens*. The hospital refused appellant's request to share the cost of *locum tenens*. On September 21, 2001, {Slip Opn. Page 6} appellant notified Dr. Perrott that Dr. Mark Preston would cover his practice from September 22 to October 3, 2001.

On September 14, 2001, appellant received notice that the MEC was conducting an investigation to determine whether he had complied with the board's July 13 decision. Appellant appeared before the MEC on September 25, 2001. On October 12, 2001, the MEC suspended appellant's membership and privileges at the hospital, effective October 16, and recommended that those privileges be revoked. The MEC cited appellant's failure to (a) provide a plan of care for his patients, (b) complete courses on interpersonal and peer relations, and (c) notify his patients of his inability to care for them at SVMH. The MEC listed 12 examples of patients who had arrived at the hospital for delivery of their babies between August 2 and September 12, 2001. In each case the obstetrician on call delivered the baby, except for one, who was delivered by the nurses before the obstetrician arrived. The MEC specifically noted eight of these patients who were unaware that appellant would not be able to deliver their babies. In four cases the hospital did not have prenatal

records. On October 26 the MEC amended its notice of charges to add six more patients who were unaware of the suspension. For five of them, the prenatal records were not at the hospital. All of these patients appeared at the hospital between October 21 and October 24, beyond the original suspension period. On November 27, the MEC added another charge related to patient care along with a new charge of failing to maintain malpractice liability insurance. Appellant requested a "Fair Hearing" as provided for in the hospital's bylaws. In response, the hospital sent him a final notice of the charges and proposed action. The notice also informed appellant that Justice Nat A. Agliano (ret.) had been appointed as an independent hearing officer for the proceeding. The Hearing Panel was to be composed of Elizabeth Helfrich, Esq., William Keller, M.D., and Robert Van Horne, M.D. All three of these panel members had served on the Hearing Panel in the previous proceeding, and Justice Agliano had served as the hearing officer. {Slip Opn. Page 7}

Appellant objected to the appointment of Justice Agliano as hearing officer, and to all three of the Hearing Panel members. Because Justice Agliano had presided over the prior hearing, appellant believed that he might have already formed an opinion regarding the issues before him. Moreover, appellant suggested that Justice Agliano might not be impartial because his conduct in the prior proceeding was under judicial scrutiny. In addition, Justice Agliano had presided over a number of Fair Hearing proceedings at the hospital, resulting in "significant financial gain" to him, which presented another likely source of bias in the hospital's favor. Finally, appellant pointed to a "shocking" disclosure by the hospital: Justice Agliano had once served on the Board of Governors of the Salinas Valley Memorial Hospital Foundation, whose mission was fundraising for the hospital.

Appellant also objected to the three members of the proposed Hearing Panel on several grounds, including the fact that all had served on the Hearing Panel in the prior proceeding. According to appellant, the selection of these three violated the hearing provisions in the hospital's bylaws. After voir dire of each member and argument by counsel, the hearing officer overruled appellant's objections.

Appellant's Fair Hearing took place between January 9 and March 21, 2002. On April 15, 2002, the Hearing Panel issued its decision and recommendations. It found unproven the charges that appellant had failed to "take" courses in interpersonal relations, that he had failed to maintain malpractice insurance, and that he had failed to provide a plan for patient care. Nevertheless, that plan "was not a plan at all," because appellant had "willfully nullified" and "abrogated" it by resigning from Natividad and forcing his patients onto the on-call physicians at SVMH. The Hearing Panel described appellant's uncooperative conduct as "irrational . . . arrogant, defiant, and a threat to patient safety." It was "particularly egregious," in the panel's view, because it was a response to a board order designed to correct his past conduct. Accordingly, the Hearing Panel agreed with {Slip Opn. Page 8} the MEC in recommending revocation of appellant's membership and privileges at SVMH.

Appellant sought review by a review panel unassociated with the hospital. At the ensuing hearing, the entire board of directors constituted the appellate review panel (ARP). Appellant objected to the inclusion on the panel of three members, citing individual conflicts of interest and the members' participation in the prior review proceeding. He asserted two grounds for his appeal: a prejudicial failure to abide by "applicable laws" and insufficiency of the evidence to support the Hearing Panel's decision. Though it did not appeal, the MEC disputed the Hearing Panel's finding that appellant had provided a plan of care for his hospital patients.

After reviewing the record and hearing argument from both sides, the board issued its decision. It first rejected appellant's procedural challenges and his proposed disqualification of the board members from hearing the appeal. After addressing various evidentiary requests, the board considered the challenge to the factual conclusions and recommendations of the Hearing Panel. The board found insufficient evidence to support the Hearing Panel's finding that appellant had created a patient-care plan as required by the July 13, 2001 decision. The July 26, 2001 memorandum from Dr. Perrott to the obstetrical staff was inadequate, the board concluded, because it failed to name the physicians who would care for appellant's hospital patients, it did not contain all the elements of the required plan, and it was intended only to notify staff of appellant's status. In any event, the board found, the evidence was clear and convincing that appellant had "failed to abide by the terms of that plan and to provide for the care of his patients in a manner consistent with it. The board finally concluded that the "overwhelming weight of the evidence" supported the Hearing Panel's determination that appellant was not {Slip Opn. Page 9} qualified to be on the hospital's staff. fn. 3 Accordingly, the board upheld the summary suspension and revoked appellant's staff membership and clinical privileges at the hospital.

On September 25, 2002 appellant filed a petition in superior court for a writ of administrative mandamus under Code of Civil Procedure section 1094.5. Among the grounds he asserted were (1) the appearance of bias of the hearing officer, which should have disqualified him from presiding; (2) improper constitution of the Hearing Panel and the ARP; (3) improper fact-finding by the ARP; (4) error in the hearing officer's preclusion of testimony by two witnesses; and (5) insufficiency of the evidence to support the revocation of his membership and privileges. After receiving written and oral argument, the trial court declined to issue the writ and subsequently entered judgment for SVMHS.

Discussion

1. *Scope and Standard of Review*

The issues presented in this appeal fall into two general categories: (1) the fairness of the proceedings before the Hearing Panel and the ARP; and (2) the sufficiency of the evidence supporting the ARP's decision. Code of Civil Procedure section 1094.5 ("section 1094.5") governs our review, which follows the same course as that of the superior court. The court's inquiry in an administrative mandate matter includes the {Slip Opn. Page 10} questions of whether there was a fair trial and whether there was any prejudicial abuse of discretion. (§ 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§ 1094.5, subd. (b).) In a case arising, as here, from a decision by a board of directors of a hospital district, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (§ 1094.5, subd. (d).) Whether the hospital's determination was made according to a fair procedure is a question of law, which we consider independently based on the administrative record. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

2. *Fairness of the Proceedings*

<PS:"HEADING 3?a. *Bias of Hearing Officer*

Appellant contends that issuance of the writ was required because the presiding officer at the Fair Hearing had a "fatal appearance of bias" caused by a financial conflict of interest. Justice Agliano, appellant argued, had a "long-standing and continuous" relationship with SVMH: He had previously served on the Board of Governors of the SVMH Foundation, a corporation that raised money for the hospital, and whose

governors were elected by the hospital's board of directors; he had served once as a mediator and once as an arbitrator in cases involving the hospital as a party; he had been engaged and paid by the hospital to be a hearing officer in at least two other SVMH cases concerning physician privileges; and he had been the presiding officer in appellant's earlier Fair Hearing. These circumstances, in appellant's view, created an "irreconcilable" economic conflict that compelled Justice Agliano's disqualification without regard to whether any actual bias was discernible. He renews these arguments on appeal.

Appellant cites *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*), where an administrative hearing officer's pecuniary interest disqualified her from {Slip Opn. Page 11} presiding over a license revocation matter. In *Haas*, a hearing took place on the county's revocation of Haas's business license. Haas objected that the appearance of bias necessitated the hearing officer's disqualification because she had been selected and paid by the county, which foresaw using her as a hearing officer in the future. The Supreme Court held that "[c]ounties that appoint temporary administrative hearing officers must do so in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work." (*Id.* at p. 1020.) The appointment procedure used by the county did create that risk because the county, as prosecuting agency, unilaterally selected the hearing officer, whose future employment in that capacity depended entirely on the goodwill of the county. In other words, "a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." (*Id.* at pp. 1031-1032.)

We believe that the circumstances presented in this case fall within the ambit of *Haas*. Pursuant to Appendix Section II(G) of the hospital bylaws, the MEC unilaterally appointed Justice Agliano as hearing officer, and his fee was paid by the hospital. fn. 4 In notifying appellant of the appointment the MEC disclosed that Justice Agliano was "not affiliated with the MEC, or the Hospital, but he used to be a member of the Board of Governors of the Salinas Valley Memorial Hospital Foundation. His term ended December 31, 1998. The Foundation is a 501(c)(3) non-profit corporation whose mission is fundraising for the Hospital." The MEC further explained that the Foundation had no involvement in any medical staff matters, which were the responsibility of the board of directors. However, the board of directors elected the board of governors of the Foundation. {Slip Opn. Page 12}

This disclosure was one of the grounds on which appellant's objection to the appointment was based. He also pointed out that Justice Agliano had presided over three Fair Hearing proceedings in the past, including his own suspension hearing, and there was the potential for further appointments in the future. These facts were sufficient to create a "possible temptation" to favor the hospital.

It is true that Justice Agliano, unlike the hearing officer in *Haas*, did not serve as factfinder, participate in the deliberations, or issue a decision recommending action by the administrative board. fn. 5 Yet, as permitted in the bylaws, he provided key rulings on admissibility of evidence and access to information. fn. 6 He also ruled on the challenge to his own appointment as hearing officer, a determination upheld by the board itself. fn. 7

We also acknowledge that there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case. As both the ARP and the trial court observed, "the

administrative record shows that the present hearing was conducted fairly and even-handedly by the presiding officer." fn. 8 The court further noted that in a previous {Slip Opn. Page 13} proceeding conducted by Justice Agliano the Hearing Panel had ruled in favor of the physician. Nevertheless, the Supreme Court emphasized in *Haas* that "the risk of bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator." (*Haas, supra,* 27 Cal.4th at p. 1030.) " 'The Court's inquiry . . . is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man" as judge.' " (*Id.* at p. 1029.)

The trial court itself advised the board to "reevaluate the selection process for hearing officers" in light of *Haas*. Its suggestion was well taken. This case illustrates the necessity for careful examination of potential financial conflicts of interest in the selection of administrative hearing officers to obviate even the possibility of bias. Principles applicable to judicial officers in court proceedings provide comparable guidance; for example, Code of Civil Procedure section 170.1, subdivision (a)(3), states that a judge must be disqualified if he or she "has a financial interest in the subject matter in a proceeding or in a party to the proceeding." And Canon 2 of the Code of Judicial Ethics states that a judge "shall avoid impropriety and the *appearance* of impropriety in all of the judge's activities." (Italics added.) The commentary to this canon provides an objective test for the appearance of impropriety: The question is not whether the judge is actually biased, but "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." (See, e.g., *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336.) Measured by these

standards and underlying principles, SVMHS's procedures for appointing hearing officers were not consistent with the appearance of impartiality. Appellant's objection on this ground was sound, and his petition for a writ of mandate should therefore have been granted. {Slip Opn. Page 14}

Because it is likely that a new Fair Hearing will take place, we will address appellant's challenge to the composition of the Hearing Panel. It is not necessary, however, to discuss the exclusion of evidence made by the hearing officer, as such rulings are moot, or the sufficiency of the evidence supporting the Hearing Panel's decision. It also would be premature to consider appellant's objections to the composition or findings of the ARP, since we have no way of knowing if another appellate review hearing will even take place and, if so, whether the same members will constitute the ARP. We do caution, however, that if an appellate review hearing does take place without counsel for either side, it would strain the bounds of due process to allow the hospital's attorney, who took an active role in assisting the MEC to bring charges against appellant, to serve as advisor to the board in the hearing. (See *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94 [city attorney's assistance and advice to hearing officer at administrative review hearing constituted an impermissible "overlapping of advocacy and decisionmaking roles" in violation of due process, as attorney had taken an active and significant role as advocate for the city in prior proceedings]; see also *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 814-816 [city attorney's interactions with board on other occasions suggested probable influence and appearance of unfairness].)

<PS:"HEADING 3?b. *Composition of the Hearing Panel*
Appellant renews his claim that the Hearing Panel was improperly constituted because its members had all served on the Hearing Panel in appellant's suspension proceeding. This

time the panel members "were faced with the impossible task of wiping their mental slates clean and conducting an unbiased hearing" in which they had to "judge the feasibility" of the restrictions they had imposed on the earlier occasion. Thus, reconstituting the panel was, in appellant's view, a violation of Business and Professions Code section 809.2, subdivision (a), and section II(F) of the appendix to the Medical Staff Bylaws, and it "guaranteed" the unfairness of the new hearing. {Slip Opn. Page 15}

Business and Professions Code section 809.2, subdivision (a), requires a hospital's peer review hearing to be held before an arbitrator or "a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate." The applicable bylaws provision similarly prohibits service on the panel of any staff member who has "actively participated in the consideration of the matter at any previous level . . . ." fn. 9

Appellant contends that the composition of the Hearing Panel violated these provisions because its members had served as "factfinder and decisionmakers" in the first proceeding. However, we agree with the trial court's determination that this was not "the same matter." As the court observed in denying the writ, "[t]he clear intent of these prohibitions is to preclude a member from sitting on a panel and reviewing its own decision made in a previous hearing. That is not what happened here. . . . The first hearing and appeal dealt essentially with the Petitioner's level of medical competency and patient care. The second hearings . . . dealt with his compliance with the conditions of his suspension."

"The rule against overlapping functions . . . applies to prevent participation at ascending levels of the process, so that a

participant will not be in the position of reviewing his own decision or judging a man whom he has either charged or investigated." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 499.) {Slip Opn. Page 16} Because the current proceeding was not a different level of the same matter, the use of the same panel members did not pose the risk that they would be directly reviewing their own decision.

All of the Hearing Panel members were subjected to voir dire; all were confident in their ability to decide the current matter fairly and independently of the previous decision, even if appellant challenged the practicability and fairness of that decision. As this court recognized in *Rhee*, "prior knowledge of the factual background [that] bears on a decision is not sufficient to disqualify a decisionmaker." (*Id.* at p. 499; compare *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 660 [unfair procedure where ad hoc committee's decision would be reviewed by executive committee, of which five members had served on ad hoc committee].) The bylaws also reflect this view, stating that "[k]nowledge of the matter involved shall not preclude a member of the medical staff from serving as a member of a Hearing Panel." Absent additional evidence that the panel members could not be impartial, their service in the prior matter did not, standing alone, disqualify them from participating in this proceeding. No violation of either the statute or the bylaws occurred in these circumstances. fn. 10 {Slip Opn. Page 17}

Disposition

The judgment is reversed. The trial court is directed to grant appellant's petition for a writ of mandate and order the challenged decision to be set aside. Costs on appeal are awarded to appellant.

Rushing, P. J., and Premo, J., concurred.

-FN 1. Appellant clarified at his Fair Hearing that Dr. Halfpenny did not agree to cover appellant's entire patient load, but only promised to help in any way he could. Appellant said he did not even request full coverage from Dr. Halfpenny but only asked whether Dr. Halfpenny could cover certain complicated cases.

-FN 2. The original draft of the memo stated, "Therefore, while many patients may transfer care to another facility or make arrangements to have another physician provide obstetrical services, there may be Dr. Yaqub patients presenting to SVMH for obstetrical care." Dr. Perrott removed the dependent clause at appellant's suggestion based on appellant's prediction that "the overwhelming majority will show @ SVMH."

-FN 3. In the board's view, even if Dr. Perrott's memorandum constituted the required plan, nevertheless "Dr. Yaqub did not sufficiently advise his patients that he would not be available to care for them at the Hospital. Dr. Yaqub did not adequately provide for the care of his patients during the period of his suspension. Dr. Yaqub continues to be unwilling and unable to cooperate with Hospital management, his peers, and his colleagues in the orderly and proper administration of the Hospital. Dr. Yaqub's conduct and attitude are arrogant and defiant. And last, but not least, Dr. Yaqub's conduct and attitude pose a continuing threat [to] patient safety. [Fn. omitted.] These findings compel the conclusion that Dr. Yaqub's continued practice at the Hospital posed an immediate danger to the health of its patient[s], and the ARP so finds."

-FN 4. The fee was paid through JAMS, which contracted with Justice Agliano to provide his services as hearing officer.

-FN 5. The record also contains no direct evidence regarding the hearing officer's assistance to the Hearing Panel in its deliberations at this proceeding. The record does indicate that in appellant's *prior* hearing on the suspension, Justice Agliano advised the Hearing Panel that the MEC had the burden of proof and that the charges must be proved by a preponderance of the evidence. Dr. Keller, one of the Hearing Panel members, recalled receiving such instruction and added that the panel had "felt well guided throughout the proceedings."

-FN 6. Under the hospital's bylaws, the presiding officer "ensures that all participants have a reasonable opportunity to be heard, maintains order, determines the order of procedure of the hearing in accordance with these bylaws, and makes rulings on questions pertaining to matters of procedure and admissibility of evidence."

-FN 7. The ARP found that "the selection of Justice Agliano and the panelists did not violate any of the various applicable statutes, the Bylaws, or principles of due process/fair procedure."

-FN 8. In the ARP's view, "not only is there no evidence of bias on the part of these individuals that impacted the fairness of the subsequent hearing and decision-making process, but there is no evidence of bias whatsoever."

-FN 9. Section II(F) of the Appendix to the Medical Staff Bylaws states, in pertinent part: "The Medical Executive Committee shall appoint a Hearing Panel. The Hearing Panel shall include not less [*sic*] than three members, at least two of whom must be physicians; one member shall have the same healing arts licensure as the physician requesting the hearing. Medical staff members who have actively participated in the consideration of the matter at any previous level, or who are in direct economic competition with the physician requesting

the hearing, are not eligible for appointment to the hearing panel."

-FN 10. Appellant makes a brief assertion that the Hearing Panel members had "disabling conflicts" but does not supply supporting argument, beyond the mention of Dr. Van Horne's "economic interest" in having sold the hospital a telephone network. We addressed a more fully developed argument on this point in H024953. For both of these reasons it is unnecessary to consider in the present appeal whether disabling conflicts existed.

Including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached and an explanation of the procedure for appealing the decision. The report may recommend affirmation, modification or rejection of the original recommendations of the Executive Committee, and the reasons therefor. The arbitrator also may remand the matter to the Executive Committee for further consideration of specified issues. A copy of the report and recommendations shall be provided to the appellant, either by personal delivery or by registered or certified mail.

5. If dissatisfied with the report and recommendations of the arbitrator, the appellant and/or the Executive Committee may request appellate review of such report and recommendations. Appellate review shall be requested in writing, addressed to the Hospital administrator, within ten (10) days of receipt of the report. Failure to submit such timely request shall be considered a waiver of the right of further review or appeal and acceptance of the report and recommendation of the arbitrator.

6. Failure of the appellant to appear and proceed at the hearing before the arbitrator, without good cause, shall constitute his or her acceptance of the recommendation and action of the Executive Committee without any right to appellate review.

d. Appellate Review

1. If appellate review is timely requested by the appellant or the Executive Committee, the Chairman of the Board of Directors shall appoint a three member Appellate Review Panel, at least one of whom shall be a member of the Professional Staff of the Hospital who was not a witness at the prior hearing. The Chairperson of the Panel shall be selected by the Chairman of the Board of Directors.

2. The appellate hearing shall take place at a time and place agreed to by the Chairperson of the Appellate Review Panel and the Appellant, preferably within sixth (60) days of receipt of the request for hearing and shall be based upon the prior hearing. No additional witnesses or evidence shall be presented unless the panel is convinced that the witnesses or evidence could not have been presented at the prior hearing. Each party shall have the right to appear and respond, may be represented by legal counsel and may present a written statement or brief and an oral presentation to the Appellate Review Panel. If the panel allows witnesses to appear before it, they may testify and be cross examined. The chairperson of the panel shall determine admissibility of evidence and appropriate procedures for examination of witnesses before the panel.

3. A verbatim record shall be made of the appellate hearing. If either side chooses to engage a shorthand reporter, it shall bear the cost thereof.

(b). This proves that Respondents hired their "outside reviewer" *not* to perform an independent review as they had claimed, but to "vouch" their cases and to facilitate their intended outcome.

The outside reviewer's resultant report tainted the voting body in its vote to *issue* the Recommendation, and in its vote to *uphold* the Recommendation.

The fact that Respondents' inappropriately instructed and tampered-with "outside" reviewer *testified,* as Respondents' expert witness, at the Arbitration further violated Appellant's fair procedure rights. (POB-Point 6)

Other fair procedure violations are discussed below.

C. Arbitration Hearing

1. Arbitrator Prejudiced by False and Fabricated Material.

Respondents prejudicially placed false and fabricated materials from their illegal peer review activities and the Informal Hearing before the Arbitrator. (POB-Points 17, 18)

2. Arbitrator's Fee Paid 100% by Respondents.

That the Arbitrator was chosen and paid 100% by Respondents, and that the hearings were held at Respondents' Hospital likely added bias. Appelbaum, supra, recognized situations of bias, *apart from actual bias,* where *psychological tendencies and human weaknesses are too high to guarantee fair procedure.* (POB-Point 26)

3. Ruling on "Verbal" Charges not Part of the Written Notice of Charges Violated 809.3(1) and (4) and 809.2(d).

In five cases, the Arbitrator ruled on "verbal charges" that were not part of the written "Notice of Charges". Respondents introduced these ...

Respondents then filed the 805 report based on the upholding of the Suspension at the Informal Hearing.

2. The Formal Hearing Violated Fair Procedure.

(a) Statutory Law Prohibits A Party From Paying A Judge's Fee 100%. This Situation Also Constitutes Probability of Bias.

The Arbitrator's independence was impermissibly compromised. Respondents paid his fee 100%, and held the Arbitration at Respondents' hospital. Evidence Code 170.1(a) states a judge shall be *disqualified* if he has a financial interest in a *party* to the proceeding. (RB:21,L.9.)

This situation also constitutes a "probability for bias". Appelbaum, supra, 657. (RB:21,L.4-12.)

(b) The Arbitrator Ruled On "Verbal" Charges Not Part Of The Written Notice Of Charges.

RB:21,L.13-19 ignores AOB:23-24, wherein Appellant cited POB-Exhibit-27B-1, which cited: Tr.2483-2484:23-20;*Tr.*2479-2480: 21-8;*Tr.*3069:7-13;*Tr.*2899:6-14;*Tr.*3067-3068:23-13;*Tr.*2291-2292:25-1;*ARP.Tr.*68-69:22-15. These transcripts (Tr.3067-3068:23-13;*Tr.*2291-2292:25-1) prove the Arbitrator *defined* the "verbal" charges as not part of the *written* "Notice of Charges"(Resp.2232-2237), and specifically stated he would *not* address any "verbal" charges in his Findings.

Respondents claim "*Tr.2185:5-2186:*1" as the "consensus definition" between the Arbitrator and MEC. These transcripts confirm the Arbitrator defining the "verbal charges" as separate from the written "Notice of Charges", and that he will only focus on the "written Notice of Charges." (RB:22,L.3-12.)

59 component-charges. [7] Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d.124, states that if an Administrative body has imposed a single discipline based on multiple charges, some of which are not sustained by evidence, and if there exists any doubt whether the same action would have been taken on proper findings, the matter must be returned for redetermination.

On the charges the Arbitrator found against, his findings were contrary to the evidence. (See POB-Attachments Vols. 1, 2 and 3)

D. Appellate Review Board Hearing

1. Respondents Represented by Counsel at ARP Hearing when Appellant was Not, Violating 809.3(c).

At the ARP Hearing, Respondents were represented by their attorney, while Appellant had no attorney. Clark's dual role as Kaiser's counsel, and Legal Adviser to the ARP, violated 809.3(c) which states: "No peer review body shall be represented by an attorney if the licentiate is not so represented." (POB-Point 3)

Respondents' attorney, Yamamoto, was present at the Informal Hearing where the Bylaws violated state law by prohibiting Appellant an attorney present, violating 809.3(c). (POB-Point 12).

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7. This number does not include "documentation charges", which were separate from the written notice of charges of 8/15/94, and not specified until the time of the Arbitration, over objection. (POB-Point 8.)

2. ARP Composition Violated Fair Procedure-Challenge Prevented.

The ARP was a Kaiser-appointed, Kaiser-affiliated, three-member panel with Kaiser's counsel appointed as the panel's "legal advisor". Reres, the panel's Chair, was a member of the Board of Directors of the Hospital and Health Plan, and was appointed by the Chairman of Board of Directors of the Hospital and Health Plan, who appointed the other two members of the ARP. [Resp.1731,1774]

Appellant stated to the panel he was in the position of asking Kaiser personnel to overturn a decision in Kaiser's favor. [ARP.Tr.48:10-13]

Applebaum, supra, states: "...the chances of a contradictory conclusion by another body within the hospital were virtually nil."

Applebaum, supra, p. 657 recognized "conflicts of interest as a bar to a fair hearing; "fair procedure includes the right to impartial adjudicators"; adjudicatory situations of "bias apart from actual bias" where "psychological tendencies...compels the conclusion that the risk of prejudgment is too high to guarantee fair procedure"; and "Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided". Withrow, supra.

While attempting to voir dire the three-member Kaiser-affiliated panel as to bias by their Kaiser affiliation, Reres interrupted, stating the panel was properly comprised per the Bylaws, and "the panel cannot have an opinion different than the bylaws." Reres omitted that the Bylaws [CT.64] state only *one* of the three-member panel must be from the Hospital's Staff. Reres then threatened Appellant accept the panel as comprised or the hearing could be terminated.

Respondents violated Appellant's fair procedure right to conduct a liberal examination to discover possible bias or conflicts of interest. Rosenblit, supra p. 231.

The ARP's composition and its probability for bias violated fair procedure.

* * *

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE: 01/10/03 DEPT. 86

HONORABLE: DAVID P. YAFFE JUDGE

C. HUDSON DEPUTY CLERK
M. LOMELI CRT. ASST.
Deputy Sheriff NONE

Electronic Recording Monitor
D. CASE CSR #8739 Reporter

9:30 am BS069856

ROBERT J. JAFFE, M.D. (X) Plaintiff
Counsel:
IN PROPRIA PERSONA

vs.

KAISER FOUNDATION HOSPITAL
SOUTHERN CA Defendant
Counsel:
SARAH G. BENATOR(X)
LOWELL C. BROWN (X)

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE;

RESPONDENTS, KAISER FOUNDATION HOSPITALS' NOTICE OF MOTION TO SEAL THE RECORD:

Matter comes on for trial and is argued.

The Petition for Writ of Mandate is denied.

Petitioner challenges an administrative decision terminating his staff privileges at Kaiser Foundation Hospital in Panorama City, California.

The administrative proceeding that resulted in petitioner's termination extended over a period of more than 5 years and were conducted in multiple stages as prescribed by sections 805 through 809.9 of the Business & Professions Code. The proceedings have generated an administrative record consisting of 16 volumes of documents consuming 9085 pages. A 32 volume reporter" transcript of arbitration proceedings consisting of 3,563 pages, and a 2 volume reporter's transcript of proceedings before an Appellate Review Panel, consisting of 321 pages, all of which is received in evidence.

In addition, petitioner has submitted two volumes of documents as an appendix to his opening brief, two volumes of exhibits to his reply brief, and three looseleaf volumes of documents described as an appendix. Respondent moves to exclude this material on the ground that it is not part of the administrative record. Petitioner contends that it is part of the administrative record. The objection is overruled and the above described materials submitted by petitioner are admitted by Petitioner are admitted into evidence.

Respondent moves to seal the entire administrative record on the ground that there is contained within it personal information concerning 15 patients who were treated by Petitioner. The motion is not narrowly tailored to those documents, or portions of documents, that contain such personal information, however, and the motion must therefore be denied because the court is not supplied with sufficient information.to make a narrowly tailored order as required by CRC 243.1(e)(1). The documents lodged by the parties, however, will be returned to counsel for respondent at the conclusion of this hearing. Counsel for respondent is

ordered to maintain said documents intact as received from the court until the judgment in this matter becomes final, and to transmit such documents to any other court that assumes jurisdiction over this matter.

Disciplinary proceedings were commended by respondent against petitioner in 1992 or 1993. A peer review committee considered some of the charges and found them to be warranted on August 20, 1993 (5 A.R. 2012).

An executive committee of the hospital staff recommended that petitioner be immediately suspended and that his staff privileges be terminated, in a letter to petitioner dated August 15, 1994 (5 A.R. 2233-2237). Petitioner then requested a hearing pursuant to section 809.1 of the Business & Professions Code, and a protracted arbitration proceeding culminated in the issuance of findings and decisions of the arbitrator on December 15, 1997 (1 A.R. 8-32). Petitioner then appealed the determination of the arbitrator to an Appellate Review Panel of the Board of Directors of respondent, which issued the final administrative decision on June 8, 1998 (1. A.R. 4-6), affirming the decision of the arbitrator and the termination of petitioner from the professional staff of the hospital.

Petitioner challenges the final administrative decision by petition for writ of administrative mandate pursuant to section 1094.5 of the Code of Civil Procedure.

Petitioner first contends that the Medical Executive Committee that recommended petitioner's termination on August 15, 1994 violated section 809.2 of the Business & Professions Code because the persons on the committee who investigated the charges against petitioner were the same persons who recommended his termination (Opening Brief 4:25-5:6). The contention has not merit because section 809.2 applies to the arbitration proceeding, not to the actions

of the Medical Executive Committee.

Petitioner's contentions numbered 4, 5, 6, 17 and 18 accuse Dr. Schottinger, the Chairperson of the Medical Executive Committee, of various acts of misconduct. This court does not review the actions of the Medical Executive Committee, so these contentions by petitioner are irrelevant. The Medical Executive Committee neither conducted the fair hearing that petitioner was entitled to nor did it render the final administrative decision that is to be reviewed by this court.

In his contention number 8, petitioner argues that his right to a fair hearing was violated because the Medical Executive Committee dropped six of the charges against petitioner after issuing its recommendation and added two new charges, which were then referred to arbitration. There was nothing wrong with the adding and deleting of charges as a result of the review of charges against petitioner by the Peer Review Committee and the Medical Executive Committee. These were investigative stages to determine which charges were valid and which were not. Petitioner makes no showing that he did not receive the information set forth in section 809.1(c) of the Business & Professions Code, before the arbitration hearing was conducted pursuant to section 809.2 of the Business & Professions Code.

Petitioner next contends, in the contention numbered 15 in his Opening Brief, that the Appellate Review Panel did not perform a proper and independent review of the evidence because it did not review all of the medical records submitted in the arbitration proceeding, and that the Appellate Review Panel did not articulate in its written decision a connection between the evidence produced in the arbitration and the conclusion that the Appellate Review Board Reached. These contentions have no merit. Petitioner cites no evidence in the administrative record to support his contention that the

Appellate Review Panel did not properly review the decision of the arbitrator. Section 809.4 of the Business & Professions Code does not require any appellate review at all, and it provides that if such review exists, it need not be de novo. Petitioner's contention that the Appellate Review Panel was required to independently review all of the medical records submitted in the arbitration proceeding is not supported by reason or authority. The decision by the Appellate Review Panel bridges the analytic gap between the raw evidence produced in the arbitration proceeding and the ultimate decision or order. That is all that is required. Topanga Association v. County of Los Angeles, 11, Cal.3d 506, 585 (1974).

In his contention number 16 petitioner contends that the Appellate Review Panel improperly disregarded the findings of the California Medical Board that petitioner complied with the requisite community standard of care. There is no evidence in the administrative record to support the contention that the Appellate Review Panel "disregarded" the medical board's finding or that it gave the Medical Board's finding "no weight." (Opening Brief 23:18-19, 26). The administrative record instead shows that the Appellate Review Panel "carefully reviewed" the letter from the Medical Board (1 A.R.5, paragraph 4), and found that petitioner's quality of care and services did not comply with the hospital's standards. There is also no evidence in the administrative record that the Appellate Review panel imposed a higher standard than the Medical Board. It is equally likely that the findings of the Appellate Review Panel and the medical Board were different because they were based upon different evidence concerning petitioner's deviation from the same standard of care.

In his contention number 26, petitioner contends that the arbitration proceeding was biased because the arbitrator's fee was totally paid by respondent. (Opening Brief 34:9-15).

The contention has no merit because no such objection was raised by petitioner early enough so that something could be done to correct it, and no bias on the part of the arbitrator is shown. Such an arrangement for the payment of the arbitrator's fee, if it did exist, does not violate Business & Professions Code section 809.w because there is no showing that the arbitrator's entitlement to a fee, or the amount thereof, was in any way affected by the outcome of the proceeding.

In his contention number 29, petitioner contends that the finding by the arbitrator that petitioner maintained an inappropriate practice of using the same syringe to inject multiple patients (1 A.R. 10:8-11, which finding was upheld by the Appellate Review Panel (1 A.R. 5, Paragraph 3), is not supported by the evidence. Petitioner attacks the finding as not supported by the weight of the evidence (Opening Brief 38:13-39:15), but the standard by which this court reviews the administrative finding is on the basis of whether it is supported by substantial evidence in light of the whole record. Code of Civil Procedure section 1094.5(d). The finding is so supported by the admissions of petitioner himself; to the Appellate Review Panel (1 ARP Transcripts 75:7-23); to Dr. Potyk (1 Arbitration Transcript 58:12-18); and to Dr. McKenzie (31 Arbitration Transcript 3386:2-15.

The remaining contentions made by petitioner are also without merit, and petitioner failed to exhaust his administrative remedies with respect to said contentions because he did not make them before the Appellate Review Panel. It is error for this court to grant relief on legal theories not presented during the administrative proceedings. The exhaustion of remedies doctrine applies equally to questions of law and fact. NBS Imaging Systems v. Board of Control, 60 Cal.App.4th 328 (1977).

Counsel for respondent is to submit a proposed judgment to

this department within 10 days together with a proof of service showing that a copy has been served upon petitioner by hand delivery or overnight courier. The court will hold it or 10 days before signing and filing it.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE: 03/124/03 DEPT. 86

HONORABLE: DAVID P. YAFFE JUDGE

C. HUDSON DEPUTY CLERK
M. LOMELI COURTROOM ASSISTANT
Electronic Recording Monitor
Deputy Sheriff: NONE C. Elkins CSR #7533 Reporter

9:30 am BS069856

ROBERT J. JAFFE, M.D. (X) Plaintiff
Counsel:
IN PROPRIA PERSONA

vs.

KAISER FOUNDATION HOSPITAL
SOUTHERN CA Defendant
Counsel:
SARAH G. BENATOR(X)
LOWELL C. BROWN (X)

NATURE OF PROCEEDINGS:

MOTION FOR NEW TRIAL:

PETITIONER, ROBERT J. JAFFE, M.D.'S NOTICE OF MOTION FOR A NEW TRIAL:

PETITIONER, ROBERT J. JAFFE, M.D.'S NOTICE OF MOTION TO VACATE THE JUDGMENT:

Matter comes on for hearing and is argued.

Petitioner's motions for new trial and to vacate judgment are denied.

NUNC PRO TUNC

Due to inadvertence and clerical error, the minute order of January 10, 2003 does not accurately reflect the order of the Court for Department 86. Said minute order is hereby corrected nunc pro tunc as of January 10, 2003 as follows:

BY ADDING ON PAGE 8, AS PARAGRAPH 1, AFTER LINE 1, the following:

"The administrative record is ordered forthwith returned to the party who lodged it, to be preserved without alteration until the Judgment herein is final, and to be forwarded to the Court of Appeal in the event of an appeal."

All other orders remain in full force and effect.

MINUTES ENTERED
03/24/03
COUNTY CLERK

MEDICAL BOARD OF CALIFORNIA
ENFORCEMENT PROGRAM
20631 VENTURA BLVD., Suite 201
WOODLAND HILLS, CALIFORNIA 91364
(818) 596-4187

May 1, 1998

Robert Jaffe, M.D.
22141 Burbank Blvd., Suite 5
Woodland Hills, CA 91367

REGARDING: Case No. 05-94-43374

Dear Dr. Jaffe:

I would like to inform you that we have completed our investigation into the information that was brought forth from Kaiser Foundation Hospital with the above assigned complaint number and we have closed our case because we have found no deviation from the Standard of Care in the Community as related to the information that has been reviewed. Please be advised the review of your case included all the information contained in charges from Kaiser Foundation Hospital. This is the same information you provided us in letter of 8/15/94 from Kaiser.

Please let me know if you have any further questions or concerns as I may be contacted directly at the above address or phone number.

Sincerely,
/s/ Mark Gonzalez
MARK GONZALEZ
SUPERVISING INVESTIGATOR

MEDICAL BOARD OF CALIFORNIA
ENFORCEMENT PROGRAM
20631 VENTURA BLVD., Suite 201
WOODLAND HILLS, CALIFORNIA 91364
(818) 596-4187

March 19, 1998

Robert Jaffe, M.D.
22141 Burbank Blvd., Suite 5
Woodland Hills, CA 91367

REGARDING: Case No. 05-94-43374

Dear Dr. Jaffe:

I would like to inform you that we have completed our investigation into the information that was brought forth from Kaiser Foundation Hospital with the above assigned complaint number and we have closed our case because we have found no deviation from the Standard of Care in the Community as related to the information that has been reviewed.

Please let me know if you have any further questions or concerns as I may be contacted directly at the above address or phone number.

Sincerely,

/s/ Mark Gonzalez
MARK GONZALEZ
SUPERVISING INVESTIGATOR

MG/rm

Petitioner invalid, or proved Petitioner to be within the standard of care. It was further shown by the independent experts who unlike Kaiser's outside reviewer, matched the fields they were asked to review, that the MEC was incorrect in the reporting of their medical facts.

See List of some examples of MEC's misrepresenta-tions, omissions, failure to report in light of the full facts, and bad faith tactics in its reporting of the 16 cases at issue (See Appendix 25 B). See (Appendix 25C) for Dr. Goldstein's Closing Statement Section II p. 3-9 addressing the MEC's tactics, misrepresentations, misconstructions, missteps, corrupted peer review process and unsubstantiated claims.

The aforementioned bad faith acts culminated in Petitioner suffering a stress-related myocardial infarction in 1995 in a then 49-year old healthy individual with minimal risk factors. (Appendix 25D, declaration from Sidney Stewart, M.D.) Additionally, the resultant filing of the 805 report resulted in irrevocable damage to his professional reputation.

26. THE FACT ARBITRATOR'S FEE WAS TOTALLY PAID BY THE MEC LIKELY ADDED ANOTHER ELEMENT BIAS INTO THE PROCEEDINGS.

The fact that the Arbitrator's fee was totally paid by the MEC over the complete two and ½ year span of the hearings likely added another element of bias, and violated Petitioner's right to a fundamentally fair hearing, and his right to an impartial decision by the Arbitrator. See Bowles Fin.Grp, Inc. v. Stifel, 22 F.3d 1010; 1994 U.S.App. This is a further violation of B&P Code 809.1(a) in that the Arbitrator gained financial benefit directly from the MEC.

27. THE ARBITRATOR PREJUDICIALLY ABUSED HIS DISCRETION AND VIOLATED PETITIONER'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL, AND HIS RIGHT TO AN IMPARTIAL DECISION. SEE BOWLES, SUPRA.

A. After the Arbitrator stated in testimony that he would not be prejudiced by the fact that Petitioner would not be testifying, the Arbitrator, in his findings, used the fact the Petitioner did not testify against him.

See testimony of Arbitrator stating he would not be biased by the fact that Petitioner would not be testifying. (Appendix point 27A -1).

See Arbitrator's Written Decision evidencing that the Arbitrator had been prejudiced by the fact that Petitioner did not testify, and specifically disregarded Petitioner's supportive

* * *

and/or the Credentials & Privileges Committee, or both. Both the "Special Investigative Committee" and the Credentials & Privileges Committee are investigative bodies; The MEC is the voting body who presided and voted at the two hearings. Therefore, under B&P Code § 809.2 the said members of the MEC (listed in Appendix 2A) were prohibited from voting at the two hearings because of their overlapping roles on the Investigative or Fact-Finding Committees in Petitioner's case.

Additionally, Rosenblit v. Superior Court (1991) 231 Cal.App.3d 1434 stated "the court does recognize conflicts of interest as a bar to a fair hearing. Hackethal v.Calif. Medical Assoc. (1982) 138 Cal.App.3d 435, 443 stated ". . .A person whose rights are being determined has a right to an impartial panel to determine those rights; and Applebaum v Board of Directors, 104 Cal.App.3d. 648; 163 Cal.Rptr. 831 stated "The right to a fair procedure includes the right to impartial adjudicators.

(See letter of 8/3/94 from Law Offices of Henry Fenton showing that Petitioner's request for the Informal Hearing was timely as required under B&P Code 809.2 (Appendix 2B Ex 93

3. IT WAS IMPROPER FOR HARRIET CLARK, WHO SERVED AS VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL TO KAISER HEALTH PLAN AND KAISER HOSPITAL, TO ALSO SERVE AS THE LEGAL ADVISER TO THE PURPORTEDLY IMPARTIAL APPELLATE REVIEW BOARD PANEL.

The fact that the Appellate Review Board Panel, whose responsibility was to have been an impartial and objective Adjudicating Body, was being advised by a legal adviser who also concurrently served as Kaiser's counsel,

violated Petitioner's right to a fundamentally fair hearing, and violated his right to a panel of impartial adjudicators. Not only is this a clear conflict of interest, but, additionally, Harriett Clark's duel role as Kaiser's counsel, and Legal Adviser to the Appellate Review Panel is tantamount to Kaiser being represented by counsel at a hearing where Petitioner was not. This violates B&P Code 809.3(C) which states that "No peer review body shall be represented by an attorney if the licentiate is not so represented. "

Additionally, the Rosenblit court stated "[T]he court does recognize conflicts of interest as a bar to a fair hearing;: Hackethal v. California Medical Assoc. (1982) 138 Cal.App.3d 435, 443 stated "A person whose rights are being determined has a right to an impartial panel to determine those rights; and Applebaum v. Board of Directors, supra states: "The right to a fair procedure includes the right to impartial adjudicators."

(See letterhead from Harriett Clark dated 2/17/98 evidencing that she was Vice President and Assistant counsel to Kaiser Health Plan and Kaiser Hospital (*Appendix point 3 -A.*)

(See testimony of Harriett Clark evidencing that she also served as Legal Adviser to the Appellate Review Board panel at the March 23 and 24, 1998 hearings. (*Appendix 3 – B).*

(See letter of 2/27/98 from Kirk Miller, Secretary of Kaiser, listing the members of the panel, and stating that Harriet Clark will serve as legal advisor to the Appellate Review Board panel *(Appendix 3 – C.*)

4. DR. SCHOTTINGER'S CONFLICTING ROLES IN PETITIONER'S CASE AS A PROCTOR, AS CHAIRMAN OF THE SPECIAL INVESTIGATIVE COMMITTEE, AS CHAIRMAN OF THE MEC (THE VOTING BODY), AND IN SUBMITTING THE FINAL REPORT LETTER TO THE MEC, AND THEN AS CHAIRMAN AND VOTING MEMBER OF THE MEC, AND AS REPRESENTATIVE OF THE MEC AT ALL FOUR OF THE HEARINGS; IN CLEAR VIOLATION OF B&P CODE § 809.2.

B&P Code § 809.2 prohibits the panel members who preside over the hearings from also serving as an accuser, investigator, fact finder, initial decision-maker and voting member in the same matter.

In Petitioner's Closing Brief, *(P.5, ¶ 2,)* Dr. Goldstein, Petitioner's representative and Chief of Medicine USC, addressed Dr. Schottinger's conflicting roles (*Appendix 4-A).*

As well, see Dr. Goldstein testimony at the Arbitration hearing regarding Dr. Schottinger's conflicts of interest as follows (*see Appendix 4 –B)*:

The court in Rosenblit, supra, addressed a lesser conflict of interest situation as follows:

"The court does recognize conflicts of interest as a bar to a fair hearing Amicus curiae suggests that members of judicial review committees are under no explicit or statutory duty to recuse themselves , and therefore, a physician must be afforded the opportunity to conduct a liberal and probing oral examination of the committee members which is calculated to discover {Page 231 Cal.App.3d 1449} possible bias or conflicts of interest. Here the chairman of the Appellate

* * *

93.). Because the Kaiser Bylaws barred Petitioner from having his attorney present at the "Informal Hearing" Petitioner was therefore not aware of his right under B&P Code 809.2(c) to voir dire the panel for bias. This resulted in an injustice.. In Rosenblit v. Superior Court, supra, the court found a similar situation to be untenable. In that case, Dr. Rosenblit filed a writ petition challenging the fairness of a hearing intended to review the Staff's summary suspension of his staff privileges. He claimed, inter alia, that he had not been allowed to have an attorney present during voir dire of the hearing panel members. The court of appeal held that Rosenblit's inability to be represented by counsel at the voir dire was inherently unfair:

"We observe that Hospital had barred Rosenblit's lawyer from the hearing. Alone and struggling to save his career, Rosenblit hardly could be expected to risk the wrath of those sitting in judgment by challenging their representation of impartiality. Hospital, as in Hackethal, argues Rosenblit waived his objection by readily accepting the panel The trial court agreed. Under Hackethal, however, the trial court *could not find that a layperson, unrepresented by counsel, in these circumstances* waived his right to object.

In this case, no voir dire occurred because as a layperson, unrepresented by counsel, Petitioner not aware of this right. Furthermore, had Petitioner been aware of this right, as a layperson, unrepresented by counsel, as stated in Rosenblit, he could be not have been expected to risk the wrath of those sitting in judgment by challenging their representation of impartiality.

14. At the Appellate Review Board Hearing, Petitioner Attempted to Voir Dire the Panel, But Was Denied His Right Under B&P Code 809.2(c), to a Reasonable Opportunity to Challenge the Impartiality of the Three-

Member Panel. His Challenge to the Impartiality of the Three-Member Panel was Improperly Limited.

1. The hearing officer violated B& P Code 809.2(C) by improperly rejected Petitioner 's line of questioning on whether the panel members would be biased by the fact that they were Kaiser-affiliated, and if they felt there should be another way of choosing the panelists; and

2. While attempting to challenge the impartiality of the panel members on the basis that all were made up of Kaiser personnel, the Hearing Officer ruled incorrectly by stating that the panel members, made up solely of Kaiser personnel, was in accordance with the Bylaws. (*P 9L. 25 to P. 10 L. 11*). This is incorrect. The Bylaws, state that only one of the three member panel must be from must be from the professional staff of the hospital: (see Appendix 14–D)

3. The testimony (*Appendix, point 14-A*) shows that Dr. Reres shut down Petitioner's line of questioning, while he was attempting to question the panel members on whether they would be biased by the fact that they were Kaiser personnel. This violated Petitioner's right to conduct a liberal and probing oral examination of the panel members which is calculated to discover possible bias or conflicts of interest. (See Rosenblit, supra.)

Recognizing the conflict of interest, Petitioner stated to the panel that he is now in the position of asking a panel of Kaiser personnel to overturn a decision made in Kaiser's favor (*p. 48 L. 10-13*). The testimony shows Petitioner's attempt at challenging the impartiality of the panel on the basis that it was solely made up of Kaiser personnel, and further shows that Dr. Reres improperly shut down this line of questioning. Dr. Reres statements "In no way will this panel or will I allow a ruling that this panel make a decision that is not in concert with the bylaws of the organization." . . .

the panelists cannot act in opposition to the Bylaws period, and that the panelists "cannot have an opinion different than the bylaws in the organization of this meeting." *(Appendix point 14-A)* evidences the way in which Dr. Reres would not allow the panelists to answer.)

Applebaum v. Board of Directors , supra, P. 6: states "*The right to a fair procedure includes the right to impartial adjudicators*". Hackethal v. California Medical Assoc. (1982) 138 Cal.App.3d 435, 443 states" "[f]Airness requires a practical method of testing impartiality." . . A person whose rights are being determined has a right to an impartial panel to determine those rights . . . Voir dire is the traditional and accepted method of selecting an impartial tribunal. These adjudicators were all Kaiser affiliated and thus held conflicts of interest and/or bias. This panel was extremely biased because Reres who chaired the Appellate panel was not only a Kaiser Affiliate, but she was a member of the Kaiser Board of Directors. (see Appendix –14 E).

It is to be noted that prior to the hearing Petitioner had requested via certified letters dated 2/17/98 and 2/24/98 that the panel not be Kaiser affiliated (*see Appendix, point 14 -B*). Such request is in keeping with the AMA Guidelines regarding peer review which state that "when objectivity cannot be assured, such as in cases of Hospital control or group practice arrangements, *the Hospital has to request or at least concur in the request for such service*." (*Appendix, 14-C*) Regarding conflicts of interest, Rosenblit, supra, stated:

"The court does recognize conflicts of interest as a bar to a fair hearing Amicus curiae suggests that members of judicial review committees are under no explicit or statutory duty to recuse themselves, and therefore, a physician must be afforded the opportunity to conduct a liberal and probing oral examination of the committee members which is calculated

to discover {Page 231 Cal.App.3d 1449} possible bias or conflicts of interest. . . . Here the chairman of the appellate board and the chairman of the judicial review committee had both been treating physicians on one of the cases under scrutiny. In circumstances such as these, an opportunity to expose potential bias essential. Rosenblit was denied any semblance of fairness by the secret unreported voir dire conducted by the members themselves".

The Rosenblit court also affirmed the trial court's conclusion that voir dire had been unduly restricted. (Id.at.443.) "Rosenblit contends the secret voir dire of the hearing panel impermissibly compromised his ability to obtain a fair hearing. We agree."

15. The Appellate Review Board Did Not Perform a Proper and Independent Review Without Reviewing the Medical Records, and Did Not Articulate in its Written Decision a Connection Between the Evidence Produced at The Hearing And The Conclusion It Reached.

The Appellate Review Board admitted that it had not received nor reviewed the medical records. (see Appendix, point 15-A.) The medical records contained data vital to a fair evaluation, especially since Petitioner had raised the issue before the Appellate Review Board that the MEC had not reported the true and correct facts of the medical records, and that the arbitrator had ignored the medical records (see Appendix, point 15- B). It was not possible for the Appellate Review to make a proper ruling without fully reviewing the medical records.

Furthermore, without the medical records, how could the Appellate Review Board have concluded what it stated in its written decision regarding the medical records (Appendix 15-C).

DR. ROBERT JAFFE: And it's my understanding that the materials that the three panelists are discussing is the testimony in the transcript. Is that correct? Are there any other materials that you have reviewed or should have reviewed?

DR. GORDON: There's a whole box full of binders like this. I only brought two out of six or eight of them.

DR. ROBERT JAFFE: and I don't think that the panelists, with all due respect -- and I appreciate and have a good sense of your sincerity, but I don't think you answered my basic question, and that was should we be proceeding today given the number of issues that I've laid out, and those issues being that there was a miscommunication or misunderstanding. Whose fault was it would be up for grabs. It's not a question, I think, of fault. the facts are that there was a misunderstanding. we're here for a good effort and the truth to be gained. and so the question of issue would be proceeding, and the other question is to the panelists, should Dr. Jaffe have had a say in the choosing of the panelists, and should they have been from non-Kaiser surroundings.

DR. RERES: Dr. Jaffe, we are here at your request in an appeal of the arbitration process. if we

Continue with this meeting, it is at your request. It is not our decision to be making whether or not the appellate review shall continue. If you feel that it does not serve your purposes, then we can terminate the hearing. In no way will this panel or will I allow a ruling that this panel make a decision that is not in concert with the bylaws of the organization.

DR. ROBERT JAFFE: Okay. so I appreciate what you're saying, and given that I'm in the hot seat and extremely anxious, let me think a little bit about what you said, but still, my question was what are the wishes of the panel. Does the panel want to proceed, or does the panel want to wait and say Dr. Jaffe should be certain that he's prepared?

Does the panel state, "well, yes, the bylaws are as printed, but should there be another way of choosing the panelists?" and that's my question that I -- and I throw it out not for me to make a decision whether to proceed today but to get their input before. If you ask me to make a decision today, then I can, but I want to respect and I want to hear what the panelists say.

DR. RERES: The panel cannot act in opposition to the bylaws, period. We are here today at your request. if you choose to not continue with the hearing, then it is your choice and not the panel's. The

panel is here to do the work of an appellate review.
DR. ROBERT JAFFE: All right. So I understand you correctly, the panel cannot answer my question. Do I understand you correctly? They are here by the bylaws and are not to give an opinion to my questions?
DR. RERES: They cannot have an opinion different than the bylaws in the organization of this meeting.
DR. ROBERT JAFFE: I see. Can I ask their own individual opinions?
DR. RERES: You can ask for their opinions. Dr. Patel?
DR. PATEL: Yes, I feel that we need to go through and abide by the bylaws of the hearing. Again, I think the fact that we've come here without any prior knowledge of the case after being appointed to the review panel is in accordance with any bylaws, as my understanding, and I feel that it is important to proceed.
DR. RERES: Dr. Gordon?
DR. GORDON: I would agree with Dr. Patel. we really have to go by the bylaws. We have no other choice.
DR. RERES: Dr. Jaffe.
DR. ROBERT JAFFE: You're asking for my

opinion?
DR. RERES: I'm stating we have answered your question.
DR. ROBERT JAFFE: I see. Okay. all right. I accept what you have said, and now you have said it is my decision whether to proceed, and if I say,"Do you mean proceed today, or is it possible to ask for a continuance?" What is the answer?
DR. RERES: When did you receive a copy of the bylaws?
DR. ROBERT JAFFE: I honestly do not recall, but it would have been within the last few weeks by way of Ms. Clark's office, although, of course, throughout the years, I've received copies of the bylaws.
DR. RERES: Have you received a copy of the transcript of the pleadings?
DR. ROBERT JAFFE: I don't know what you mean. I'm sorry.
DR. RERES: Have you received a copy of the arbitration hearing officer's assessment?
DR. ROBERT JAFFE: you mean the written decision by the arbitrator?
DR. RERES: yes.
DR. ROBERT JAFFE: Yes, I have.
DR. RERES: Included in that was the appeal

* * *

Court of Appeal, Second Appellate District, Division Five

No. B166698

S130599

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT J. JAFFE, M.D., Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITAL, ET AL., Defendants and Respondents

---

Request for judicial notice denied
Petition for review DENIED.

Werdegar, J. was recused and did not participate

SUPREME COURT
FILED
February 16, 2005
Frederick K. Ohrich Clerk
Deputy

George
CHIEF JUSTICE

---

(3)

No. 04-1536

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROBERT J. JAFFE, M.D.,

Petitioner,

v.

KAISER FOUNDATION HOSPITAL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal Second Appellate District

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court has jurisdiction to review a private hospital's peer review action against a physician based on the physician's claim that the peer review action violated the physician's Due Process rights guaranteed by the United States Constitution, when that peer review action (a) did not involve any state action, and (b) involved medical judgments made by private parties according to professional standards that are not established by the state?

2. Whether the United States Supreme Court has jurisdiction to review a state court's analysis of state law based on a claim that the state court's analysis is inconsistent with federal case law, when the federal cases cited address an entirely different subject matter?

3. Assuming that the United States Supreme Court does have jurisdiction to hear a matter that involves a private hospital's peer review action against a physician, whether the private hospital's payment of a private arbitrator's fees infringes on any Constitutionally protected right when (a) the arbitrator was mutually appointed by the parties after voir dire; (b) the arbitrator's fees were not dependent on the arbitration's outcome; (c) the physician never offered to pay any portion of the arbitrator's fees; and (d) the physician never objected to the appointment of the arbitrator or the hospital's payment of the arbitrator's fees until after the conclusion of the arbitration?

CORPORATE DISCLOSURE STATEMENT

Neither Kaiser Foundation Hospital, Southern California Permanente Medical Group, nor Kaiser Foundation Health Plan, Inc., has a parent corporation; nor do any of them issue any stock; therefore, no publicly owned company owns ten percent or more of their stock.

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IN THE

Supreme Court of the United States

No. 04-1536

ROBERT J. JAFFE, M.D.,

Petitioner,

v.

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Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Despite citing various federal statutes and cases in his petition for certiorari, Petitioner fails to raise any valid federal question or other issue that would be appropriate for this Court's review. No provision of the Constitution or federal statute is at issue. No rift exists between state law and federal law. No conflict exists between a state court ruling and a decision of any United States Court of Appeals. Instead, Petitioner simply complains about the state court's analysis of how state law applies to a private entity. Because no federal question is raised, respondents Kaiser Foundation Hospital, South-

ern California Permanente Medical Group, and Kaiser Health Plan, Inc. respectfully assert that certiorari is inappropriate.[1]

Respondent Kaiser Foundation Hospital—Panorama City ("Respondent") is a private hospital that suspended, and then terminated, Petitioner from its medical staff due to Petitioner's significant deficiencies in clinical judgment and care. Pursuant to California law, Respondent provided Petitioner with a private, internal hearing and appeal to challenge the suspension and termination. After Petitioner lost the hearing and appeal, he filed a petition pursuant to California law to the California Superior Court. The Superior Court applied California law and upheld the termination. Petitioner appealed to the California Court of Appeal, which also applied California law and upheld the termination. The California Supreme Court denied his petition for review. Nothing in this process raised a federal issue.

Because Respondent's decision to terminate Petitioner's medical staff privileges and the state courts' findings upholding the termination do not raise any federal questions, Petitioner makes claims about the hearing process Respondent provided that are senseless and misleading. Petitioner's first such claim is that the process violated his federal due process rights. Each of the respondents is a private entity, not a state actor. Petitioner's federal due process claims are therefore invalid. Petitioner's second claim is that the private arbitrator was biased. This argument is based on false assertions regarding the arbitrator's appointment, and, again, does not raise a federal question. Finally, Petitioner claims that the California courts' rulings conflict with federal and state

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[1] Although Petitioner identifies Kaiser Foundation Hospital, Southern California Permanente Medical Group, and Kaiser Health Plan, Inc. as Respondents, the only matter Petitioner addresses in his Petition for Certiorari is an action by Kaiser Foundation Hospital—Panorama City. Therefore, Southern California Permanente Medical Group and Kaiser Health Plan, Inc. are inappropriately identified as Respondents.

case law. Because the California courts reviewed a private entities' compliance with state law, and because the application of state law did not conflict with federal law, this argument also fails.

Ultimately, this case is about Petitioner's disappointment that the state courts' application of state law did not come out in his favor. His mere disappointment does not raise the issue to a federal question worthy of review by the United States Supreme Court.

JURISDICTION

Petitioner improperly asserts jurisdiction under United States Supreme Court Rules 10(b) and 10(c). Contrary to Petitioner's assertions, this case does not involve any federal Constitutional or statutory rights, and does not raise any federal questions or conflicts with state court rulings. Therefore, the United States Supreme Court does not have jurisdiction over this case.

STATEMENT OF THE CASE

I. STATE LAW GOVERNING HOSPITALS AND MEDICAL STAFF PEER REVIEW

To understand the factual and procedural history of this matter, it is important to understand California's hospital licensing and peer review laws. California hospital's are licensed under title 22 of the California Code of Regulations. Under California licensing law, final authority and responsibility for the conduct of an acute care hospital rests in the hospital's governing body, which is responsible for assuring that the medical staff establishes controls "designed to ensure the achievement and maintenance of high standards of professional ethical practices" at the hospital. Cal. Code Regs. tit. 22, § 70701(a)(7) (2005). California hospitals have "an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to

patients in the hospital." Cal. Code Regs. tit. 22 § 70703(a) (2005). In California, a physician may not practice at the hospital if he or she is not a member of the medical staff, and

> [m]embership on the medical staff . . . [must] be restricted to physicians . . . competent in their respective fields, worthy in character and in professional ethics.

Cal. Code Regs. tit. 22, § 70701(a)(1)(E) (2005).

Hospitals "insure the competence of [their] medical staff[s] through careful selection and periodic review," which is a "necessary predicate to delivering quality health care." *Bell v. Sharp Cabrillo Hosp.*, 212 Cal. App. 3d 1034, 1050-51 (1989). If a hospital does not adequately review the competence of practitioners to whom it grants privileges, that hospital is subject to liability to patients for the practitioners' negligence. *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 346 (1982); *see Hongsathavij v. Queen of Angels Hollywood Presbyterian Med. Ctr.*, 62 Cal. App. 4th 1123, 1143 (1998).

The periodic review of medical staff members' clinical care is often referred to as "peer review" or "professional review." On occasion, peer review results in the hospital restricting or terminating the physician's privileges to practice at the hospital (also referred to as "adverse action"). California Business and Professions Code section 805 requires hospitals to report certain adverse actions to the Medical Board of California if the actions were based on quality of care concerns. Reportable adverse actions include summary suspensions of medical staff privileges lasting more than 14 days and the termination of medical staff membership or privileges. Cal. Bus. & Prof. Code § 805 (West 2005). Similar to the California reporting requirements, 42 U.S.C. § 11133 requires hospitals to report certain adverse actions to the National Practitioner Data Bank ("NPDB"). The NPDB is a databank that hospitals and other healthcare entities query prior to offering membership or employment to a physician.

If the hospital's medical staff recommends that the governing body take an adverse action that would, if adopted, result in a report to the Medical Board of California, the hospital is required under California Business and Professions Code sections 809 *et seq.* ("Section 809") to provide the physician with an internal, private hearing that meets the process requirements outlined in the statute. In most cases, the hospital must provide the hearing process prior to taking the adverse action; however, summary suspensions may be implemented before a hearing if (1) the physician poses an imminent danger to any person, and (2) the physician receives the hearing rights in Section 809 after the summary suspension's imposition. Cal. Bus. & Prof. Code § 809.5 (West 2004). Although Section 809 outlines the hearing's procedural requirements, the hearing is a private proceeding, provided by the hospital. Unlike California law, federal law does not require hospitals to provide any hearing rights to a physician when taking action that must be reported to the NPDB. *See*, 42 U.S.C. §§ 11111-12 (1995).

II. RESPONDENT'S ACTION AGAINST PETITIONER AND SUBSEQUENT HEARING

Respondent took adverse actions against Petitioner's medical staff privileges that required reports to the Medical Board of California and the NPDB, and resulted in a hearing that complied with Section 809.

Petitioner was a member of Respondent's Medical Staff from 1977 to 1998. In 1994, after numerous concerns surfaced regarding Petitioner's clinical care and judgment, the Medical Staff investigated Petitioner and ultimately determined that he posed an imminent danger to patients at the hospital. In August 1994, the Medical Staff's executive committee, known as the Medical Executive Committee ("MEC"), summarily suspended Petitioner, and recommended the termination of his medical staff privileges. Pursuant to Section